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No. _____

# In The Supreme Court of the United States

GREEN LEAF NURSERY, INC. and GEORGE A. PENA,

*Petitioners,*

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Consistent with this Court's ruling in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), may a federal court ignore in diversity cases the controlling choice of law rule of the forum state, opting instead to apply a generalized significant relationship test and also to decline to certify the relevant state law issues?

II. Under the civil RICO statute, 18 U.S.C. § 1962, may an injured party that was not the immediate recipient of criminal conduct, but was nonetheless an intended target of the conduct and within the intended class of foreseeable victims, satisfy the proximate cause test of *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)?

III. Must a civil RICO plaintiff prove that he reasonably relied on misrepresentations made by the defendant in order to prove that he suffered injury "by reason of" the defendant's racketeering activity, as required by 18 U.S.C. § 1964(c), when the plaintiff's RICO claim is based on predicate acts of mail fraud and wire fraud?

## LIST OF PARTIES AND RULE 29.6 LIST

The names of all parties to the two proceedings consolidated for appeal by the court below are as follows:

1. Green Leaf Nursery, Inc.; and

2. George A. Pena.

Petitioner Green Leaf Nursery, Inc. has no parent companies and no subsidiaries.

3. E.I. du Pont de Nemours and Company.

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## PETITION FOR CERTIORARI

Petitioners respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit entered in this case on August 15, 2003.

## OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at *Green Leaf Nursery, Inc. v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292 (11th Cir. 2003) and is reprinted in the Appendix ("App.") at 1-32.

The opinions and orders of the District Court are reported at *Florida Evergreen Foliage, Inc. v. E.I. DuPont De Nemours and Co.*, 135 F. Supp.2d 1271 (S.D.Fla. 2001) and *Florida Evergreen Foliage, Inc. v. E.I. DuPont De Nemours and Co.*, 165 F. Supp.2d 1345 (S.D. Fla. 2001) and are reprinted at App. at 33-119.

## JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 15, 2003. Petitioners filed a timely Suggestion for Rehearing *En Banc*, which was denied on October 20, 2003. *See* App. at 120-21. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

*See* App. at 122-23.

## STATEMENT OF THE CASE

This is one in a series of hundreds of similar cases currently pending in federal and state courts across the nation (most notably in Florida and Hawaii) alleging that, in the early and mid-1990's, Respondent DuPont engaged in fraud and racketeering during the settlement of hundreds of products liability claims relating to DuPont's fungicide Benlate. As recently described by the Eleventh Circuit, the plaintiffs in these cases "contend that after settling their [products liability] case[s], they discovered that DuPont had engaged in a massive scheme of perjury, falsification of evidence, and fraudulent concealment of evidence to induce plaintiffs to settle their claims for less than the claims' fair value." App. at 2. DuPont's perjury, falsification and concealment of evidence were perpetrated through the use of the mails and wires and other means beginning with the first case that went to trial, the *Bush Ranch Inc. v. E.I. DuPont De Nemours and Co.* ("*Bush Ranch*"), tried in the summer of 1993 in the United States District Court for the Middle District of Georgia. DuPont's fraudulent scheme continued during the course of the then late product liability litigation in other federal and state courts.

The Ninth Circuit summarized the Benlate-fraud litigation as follows:

> The [plaintiffs], commercial nurserymen, alleged in their product liability suits that a DuPont fungicide, Benlate, was contaminated with herbicides, which killed their plants. [footnote

omitted] Many similar suits were filed by commercial growers across the nation. In early trials, DuPont falsely represented that soil tests had produced no evidence of contamination. During consolidated discovery proceedings in Hawaii, which included the Matsuuras' suits, DuPont falsely denied withholding evidence of Benlate contamination, and improperly invoked work product protection to resist disclosure of testing data. The Matsuuras allege DuPont took these steps to induce Benlate plaintiffs to settle their cases for less than their fair value.

After the [plaintiffs] settled, DuPont disclosed its testing data in the Hawaii discovery proceedings. Contrary to DuPont's prior representations, the tests confirmed that Benlate was contaminated. Additional evidence of Benlate contamination was produced in other Benlate litigation. Two district courts held that DuPont had intentionally engaged in fraudulent conduct by withholding this evidence. *See Kawamata v. United Agri Prods.*, Civil No. 91-437, slip op. at 48, 59 (Haw. Ct. App. Aug. 22, 1996) (imposing $ 1.5 million punitive sanction for discovery abuse), *aff'd*, 948 P.2d 1055 (Haw. 1997)[1]; *In re E. I. du Pont de Nemours and Co. – Benlate (R) Litig.*, 918 F. Supp. 1524, 1556-58 (M.D. Ga. 1995) (imposing sanctions potentially totaling $ 115 million),

[1] In 1997, shortly after DuPont's fraud was first discovered, the Hawaii Supreme Court commented that "[t]he record shows that DuPont committed discovery fraud upon the circuit court and the other parties. . . . [and that] the instant case presents an unusual, unique example of *unprecedented discovery fraud* perpetuated against the court." *Kawamata Farms, Inc. v. United Agri Products, Inc.*, 86 Haw. 214, 948 P.2d 1055, 1098 (1997) (emphasis supplied).

> *rev'd on other grounds*, 99 F.3d 363 (11th Cir. 1996). Although the Eleventh Circuit reversed the Georgia court on the ground that the sanctions were punitive and the court had not followed applicable criminal procedure, the court noted the "serious nature of the allegations" and stated that it assumed the U.S. Attorney would conduct an investigation, *In re E.I. du Pont*, 99 F.3d at 369 n.7. On remand, the district court asked the United States Attorney to "investigate and prosecute" DuPont for criminal contempt, *In re E.I. du Pont*, No. 4:95-CV-36 (HL) (M.D. Ga. Nov. 4, 1998) (order referring matter to U.S. Attorney), but the court ultimately approved a civil settlement resolving the matter, which required DuPont and [its former attorneys] to make payments totalling [sic.] $ 11.25 million, *see In re E.I. du Pont*, No. 4:95-CV-36 (HL) (M.D. Ga. Dec. 31, 1998) (consent order and final judgment).
>
> In their present suit, the [plaintiffs] allege DuPont committed this fraud to induce them and other Benlate plaintiffs to settle.

*Matsuura v. Alston & Bird*, 166 F.3d 1006, 1007-8 (9th Cir. 1999).

The current wave of fraud and RICO litigation against DuPont began in about 1996. The cases have resulted in at least five rulings by federal courts of appeals: *Kobatake v. E.I. du Pont de Nemours & Company*, 162 F.3d 619 (11th Cir. 1998); *Matsuura*, 166 F.3d 1006; *Fuku-Bonsai, Inc. v. E.I. du Pont de Nemours & Company*, 187 F.3d 1031 (9th Cir. 1999); *Mazzoni Farms, Inc. v. E.I. du Pont de Nemours & Company*, 166 F.3d 1162 (11th Cir. 1999); and *Foliage Forest, Inc. v. E.I. du Pont de Nemours & Company*, 172 F.3d 1284 (11th Cir. 1999); and at least three (3) rulings by state supreme courts: *E.I. du Pont de Nemours &*

*Company v. Florida Evergreen Foliage*, 744 A.2d 457 (Del. 1999); *Mazzoni Farms, Inc. v. E.I. du Pont de Nemours & Company*, 761 So.2d 306 (Fla. 2000); and *Matsuura v. E.I. du Pont de Nemours & Company*, 73 P.3d 687 (Haw. 2003).

### A. Proceedings in the District Court and On Appeal.

The instant action asserted claims for both common law fraud, federal RICO, among other claims.[2] Petitioners' case is consolidated in the district court with over one hundred other cases in which du Pont is accused of fraud over previous Benlate settlements.

In a consolidated case, DuPont filed a Motion to Dismiss Plaintiffs' First Amended Complaint on March 3, 1999 arguing that a settlement agreement and release signed to resolve the underlying product liability litigation barred litigation of the instant claims. Because the settlement agreement contained a Delaware choice of law clause, on April 12, 1999, DuPont filed a Motion for Certification of the questions to the Delaware Supreme Court. Because Delaware law, unlike Florida, allowed certification directly from a U.S. district court, the district court certified the questions raised by DuPont's motion to the Delaware Supreme Court.

On December 6, 1999, the Delaware Supreme Court answered the certified questions stating that under Delaware law plaintiffs were entitled to bring their action

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[2] The Petitioners' original complaint was originally filed in the Southern District of Florida in September of 1998. On October 22, 1998, the Petitioners filed an Amended Complaint as a matter of right.

for fraud against Respondent in spite of the broad language of the release, and also defined the elements of a claim for fraudulent inducement of a release under Delaware law that would apply to the case. *Florida Evergreen Foliage, Inc. v. E.I. du Pont de Nemours and Co.*, 744 A.2d 457 (1999), *reh'g denied,* (Del. 2000). Later, in another of the consolidated cases, the Eleventh Circuit certified to the Florida Supreme Court the question of what law (Delaware or Florida), in a case such as this one where the settlement agreement contains a Delaware choice of law provision, governs claims that the settlement agreement was fraudulently induced. The Florida Supreme Court held that the law of Delaware, not Florida, governs the plaintiffs' claims. *Mazzoni Farms, Inc.*, at 313-16. In an order dated March 8, 2001, the district court dismissed all of the Petitioners' damages claims against DuPont. With respect to the Petitioners' common law fraud claims, the district court held that, notwithstanding the Florida Supreme Court's ruling in *Mazzoni Farms*, Florida law governed the Petitioners' fraud claims. The district court went on to hold that (a) DuPont's fraud and concealment are immune from suit pursuant to the rule in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell v. United States Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994); and (b) Petitioners could not, as a matter of Florida law, establish that they had reasonably relied on DuPont's fraudulent misrepresentations. Later, on August 24, 2001, the district court also dismissed the Petitioners' RICO claims.

Following briefing and oral argument, the Eleventh Circuit issued the published opinion (the Opinion) affirming the District Court's dismissals. App. at 1-32. A Petition for Rehearing *En Banc* was denied on October 20, 2003. App. at 120-21.

## REASONS FOR GRANTING THE WRIT

### I. BY REFUSING TO APPLY FLORIDA'S SPECIFIC CHOICE OF LAW RULE APPLICABLE TO THE EFFECTS OF SETTLEMENT FRAUD AND BY DECLINING TO CERTIFY EITHER THE CHOICE OF LAW OR SUBSTANTIVE ISSUES OF FLORIDA LAW TO THE FLORIDA SUPREME COURT, THE ELEVENTH CIRCUIT HAS SUBVERTED THIS COURT'S TRADITIONAL DIVERSITY JURISPRUDENCE.

The court of appeals made two crucial mis-steps in the handling of Petitioners' state law fraud claims arising from the misrepresentations made by Respondent which induced the Petitioners to enter into a settlement agreement of the underlying litigation. The first was in its determination of the applicable law that governed the substantive content of Petitioners' state law fraud claims. In holding that Florida law, and not Delaware law, provided the substantive content of the fraud action for damages, the court of appeals deliberately ignored the choice of law provision in the settlement contract, and, more important, the law of the forum's (Florida's) own choice of law rules which embrace a specific conflict of laws directive which enforces such choice of law provisions. *See* App. at 10-14. The second error made by the court of appeals was in its willful refusal, having once certified the choice of law question to the Florida Supreme Court in a previous similar case, to follow that tribunal's articulation of Florida law on the conflicts question. Compounding this mistake, the court of appeals proceeded to make rulings on the substantive content of Florida law (as related to Florida's absolute litigation conduct immunity defense and its jurisprudence of reasonable reliance in fraud claims), even though the district court had earlier

concluded, App. at 83-84, that reasonable jurists could disagree with its interpretation of Florida law.

1. If the mis-steps committed by the court of appeals were an isolated instance, Petitioners would be naturally reluctant to seek review in this Court. But there is a manifest split in the circuits on the continued vitality and application of this Court's holding in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), requiring that in diversity cases federal courts faithfully implement the substantive law of the forum state, including its conflict of law rules. In the particular context presented here, the court below preferred to apply the forum state's generic "significant relationship" balancing test under the RESTATEMENT (SECOND) CONFLICTS OF LAWS § 145 (1971), instead of Florida's more precise conflicts rule related to forum selection clauses governing underlying contractual and tort claims for fraud and misrepresentation arising from the contract, as governed by RESTATEMENT sections 187 and 201. This question has arisen on a number of occasions in the courts of appeals, and a clear divide in practice has formed, requiring this Court's intervention to resolve the split. But, just as importantly, it is necessary for this Court to articulate the appropriate approach for courts of appeals to take, under *Klaxon*, when the forum state's choice of law rules contain two principles, one general (such as interest balancing), and the other specific (including, as here, the acceptance of a contractual choice of law provision).

a. The forum selection clause used by the parties in settling the underlying litigation is simple and straightforward in its terms, and utterly standard: "This release shall be governed and construed in accordance with the law of the State of Delaware. . . . " App. at 223. The court

of appeals appeared to hold, however, that this "clause is narrow in that only the release itself is to be construed in accordance with the laws of Delaware. The clause does not refer to related tort claims or to any and all disputes arising out of the settlement or arising out of the relationship of the parties." *Id.* Whether the court of appeals' construction of the settlement agreement is correct or not (and, obviously, Petitioners would dispute that it is), is quite beside the point because the issue ultimately turns on a question of Florida's choice of law rules, and not a federal court's own independent exercise of contract construction.

Appearing to recognize that the issue could not be resolved simply by the federal court's own interpretation of the contract, the court below embarked on a flawed *Klaxon* analysis which utterly ignored the Florida Supreme Court's earlier articulation of the relevant conflicts of law standards in cases such as these, *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So.2d 306 (Fla. 2000). The Florida Supreme Court, in response to the Eleventh Circuit's earlier request for certification, *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 166 F.3d 1162 (11th Cir. 1999), ruled that the choice of law provisions of settlement agreements governed releases, *and* that the agreements did not bar plaintiffs' fraudulent inducement claims. *Id.* at 313-15. The latter holding appears to foreclose the Eleventh Circuit's ruling that settlement parties may select a law governing the contractual or equitable effects of their agreement, but not any consequent tort or damage remedies. In short, the Florida Supreme Court's earlier holding essentially confirmed the applicable choice of law rule to be used here: the parties may select, in their contract, a law to be applied not only to contractual claims

arising from the settlement (such as rescission), but also any tort claims (including fraud) for money damages which effect the contract, such as the claim made here of fraudulent inducement to enter the settlement agreement.

Not apparently liking the response it had earlier requested – and received – from the Florida Supreme Court, the court of appeals in the decision below sought to invoke a *de novo Klaxon* analysis, erroneously assuming that it was permitted to write on a blank slate. To this end, the court below chose to apply Florida's choice of law rule for *torts*, under the CONFLICTS RESTATEMENT (SECOND) section 145, which is essentially an interest-balancing analysis, in which (not surprisingly) the forum's law was deemed to apply. App. at 10-14. Not applied by the court of appeals were CONFLICTS RESTATEMENT (SECOND) sections 187 and 201, which establish a rule that "the effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law," *id.* § 201, "chosen by the parties to govern their contractual rights and duties. . . . " *Id.* § 187(1). This approach was manifestly adopted by the Florida Supreme Court in *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So.2d at 311. In short, the Eleventh Circuit – when presented with ostensibly two equally binding principles of the forum's choice of law rules – chose a generic, interest-balancing rule favoring selection of the forum's own law instead of a specific conflicts rule tailored to the particular situation at hand, and actually endorsed by the forum's highest court in an earlier referral.

b. This result is symptomatic of confusion in the courts of appeals of the proper contours of the *Klaxon* analysis, not only in the specific context of RESTATEMENT OF CONFLICTS (SECOND) § 201 disputes, but also in any

case where a federal court has to choose between two equally valid state choice of law rules. The Eleventh Circuit's opinion below is in clear conflict with the decisions of a number of other circuits which have enforced a forum's specific invocation of RESTATEMENT section 201, in preference to a general application of interest analysis. *See, e.g., Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 309 (2d Cir. 1994) (fraud claim by securities brokers against law firm involved in sale of limited partnerships by brokers was subject to choice of law provision in limited partnership subscription note); *Woodling v. Garrett Corp.*, 813 F.2d 543, 552 (2d Cir. 1987) (affirming district court's use of the parties' contractual choice of substantive law for misrepresentation and fraud claims); *Tel-Phonic Servs., Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1142 (5th Cir. 1992) (under forum's choice of law rules, contractual choice of law determined fraud in the inducement claim[3]); *Moses v. Business Card Exp., Inc.*, 929 F.2d 1131, 1134, 1139 (6th Cir. 1991) (in case for damages arising from franchise relationship, law of the contract was applied in preference to a forum's interest analysis); *Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635, 636, 641 (9th Cir. 1988) (applying

[3] Petitioners candidly acknowledge that the rule of *Tel-Phonic Servs.* was modified in later Fifth Circuit decisions, owing to the fact that Texas choice of law rules were later clarified to make a general interest balancing text prevail over the provisions of RESTATEMENT section 201. *See Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 726 (5th Cir. 2003) ("To the extent that *Tel-Phonic* is inconsistent with these cases, it has been superseded by subsequent developments in Texas law and does not control."). Nonetheless, *Tel-Phonic* remains instructive in situations where state choice of law rules give equal weight to both interest balancing and section 201.

choice of law contractual provision to determine substantive law for a fraudulent inducement claim).

The Eleventh Circuit's logic in denying the applicability of RESTATEMENT section 201 finds support only in that Circuit's case law, *see Rayle Tech, Inc. v. Dekalb Swine Breeders, Inc.*, 133 F.3d 1405, 1409-10 (11th Cir. 1998), and isolated language in one Second Circuit and one Fifth Circuit case. *See Krock v. Lipsay*, 97 F.3d 640, 644 (2d Cir. 1996); *Caton v. Leach Corp.*, 896 F.2d 939 (5th Cir. 1990). In any event, there appears to be a manifest split in the Circuits on this particular tension between interest balancing tests and the specific choice of law commands of party contracts under RESTATEMENT section 201. The Second, Fifth, Sixth and Ninth Circuit would give preference to the more specific choice of law rule contained in section 201, while the Eleventh Circuit would, in the case of conflict, impose a forum's more general interest balancing inquiry.

c. But looming in the doctrinal background here is the continued vibrancy of this Court's rule in *Klaxon*. The Eleventh Circuit's holding should be regarded as part of a larger phenomenon in which courts of appeals are subverting the normal course of determinations of state choice of law rules. As this Court made emphatically clear in *Klaxon*:

> We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins*, 304 U.S. 64, against such independent determinations by the federal courts extends to the field of conflict of laws. . . . Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the

> Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. . . .

313 U.S. at 496. In subsequent decisions of this Court, it has been made apparent that the federal courts are not at liberty to substitute their judgment for those of state tribunals as to "appropriate" or "modern" choice of law rules, *see Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) ("A federal court in a diversity case is not free to engraft onto those state [choice of law] rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits."); *see also Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (rule of *Klaxon* applies even in transfer cases).

Regrettably, some courts of appeals in recent decisions – including the one for which review is sought here – have obliquely questioned the continued wisdom and vitality of *Klaxon*, and openly considered whether they should create an "independent 'general law' of conflict of laws," *Klaxon*, 313 U.S. at 496, in order to facilitate the resolution of certain kinds of diversity cases without recourse to certification of state law issues to state supreme courts. *See Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 634-37 & n.10 (7th Cir. 2002). Indeed, it appears that some courts are beginning to follow the line suggested by the Third Circuit some time ago in *Warner v. Auberge Gray Rocks Inn, Ltd.*:

> There is a crucial difference between *Erie* and *Klaxon*. *Erie's* insistence that local law must

> govern diversity cases is freighted with constitutional obligation. Not so with *Klaxon*: as Judge Friendly observed, "the constitutional basis of *Erie* does not apply to choice of law issues. . . . " This means that *Klaxon* is a rule of policy for the sound administration of justice in the federal courts – a rule whose merit may be measured by its results. Whether, on balance, *Klaxon* advances the equilibrium of the federal system, or fosters parochialism, is matter for debate.

827 F.2d 938, 943 (3d Cir. 1987) (quoting Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 402 (1964)). This Petition presents an excellent opportunity for the Court to revisit the essential contours of the *Klaxon* doctrine in diversity cases, within the specific context of enforcing the specific choice of law agreements of the parties in applying a particular state's law to the legal effects and consequences of fraud and misrepresentation in the making of litigation settlements.

2. a. That leaves the other delicate and important issue raised by the Eleventh Circuit's handling of the state law fraud claims raised by Petitioners. That was the court of appeals steadfast refusal to certify to the Florida Supreme Court either the threshold choice of law question, or, on the merits of the application of Florida's fraud law, the application of a sweeping litigation conduct immunity defense and any reasonable reliance requirement.

On the conflicts issue, this refusal to certify is all the more peculiar insofar as the court of appeals all but agreed that it was faced with a dilemma in the application of Florida's choice of law rules, especially in light of the earlier response by the Florida Supreme Court in *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So.2d

306 (Fla. 2000). But assuming that Florida law was the proper law to apply to Petitioners' state law fraud in the inducement claims, the court of appeals was repeatedly asked by Petitioners to certify those issues for determination by the Florida Supreme Court. Indeed, Petitioners were not alone in that request. The district court's certification of its order for interlocutory review, App. at 83-84, was premised on its determination that the litigation immunity and reasonable reliance issues were close ones under Florida law and that certification of the state law issues to the Florida Supreme Court was probably warranted. Since under Florida's certification provision, *see* FLA. CONST., art. V, § 3(b)(6), federal district courts were ineligible to address such a request, the district court did the next best thing: authorized an interlocutory appeal so that the Eleventh Circuit could make such an application for certification of a state law issue.

b. Petitioners are mindful that this Court has indicated that "[w]e do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Petitioners would maintain that such "sound discretion" was abused in this case. But in light of this Court's more recent pronouncements on the virtues of certification, especially in certain classes of cases implicating significant constitutional or federalism concerns, Petitioners are skeptical whether an abuse of discretion standard is even appropriate here. As this Court indicated in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), "A more

cautious approach [in requesting certification] was in order. Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'" *Id.* at 77 (quoting *Lehman Bros.*, 416 U.S. at 390-91).

Finally, this Court observed:

> Blending abstention with certification, the Ninth Circuit found "no unique circumstances in this case militating in favor of certification." 69 F.3d, at 931. Novel, unsettled questions of state law, however, not "unique circumstances," are necessary before federal courts may avail themselves of state certification procedures. Those procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions. Taking advantage of certification made available by a State may "greatly simplif[y]" an ultimate adjudication in federal court.

*Id.* at 79 (quoting *Bellotti v. Baird*, 428 U.S. 132, 151 (1976)).

Petitioners would submit that the court of appeals more than merely abused its discretion in declining certification of the entire bundle of state law issues raised on appeal. Really at issue are the pertinent considerations that appeals courts should weigh in accepting or refusing a suggestion made (whether by a party or by a federal district court) to certify a state law issue to a state supreme court. Some federal courts of appeals have adopted a standard suggesting that when "there is no real debate" or "no genuine doubt" as to a state law question, certification is unnecessary, *see Tunick v. Safir*, 209 F.3d 67, 72 (2d Cir. 2002) (ruling in favor of certification); *Fischer v. Bar*

*Harbor Banking & Trust Co.*, 857 F.2d 4, 6-7 (1st Cir. 1988) (no certification), and Petitioners would not question that avoiding spurious certifications is a significant goal. But some courts have gone on to engraft an overarching "convenience of the parties and the court" analysis, often inclining against certification. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 178 F.3d 1363, 1365 (10th Cir. 1999).

In the years after *Arizonans for Official English*, some courts of appeals have endorsed quite liberal standards for certification, *see e.g.*, *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150-52 (2d Cir. 2001), while others (including the Eleventh Circuit below) persist in being quite parsimonious in granting certification. *See Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003); *Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998).

c. In view of this conflict in the case law, following *Arizonans for Official English*, this case offers a vehicle for revisiting the proper standard of review for certification decisions but also as to the proper considerations for certification. Insofar as this case presents compelling features, Petitioners would respectfully request that this Court summarily vacate and remand that part of the Eleventh Circuit's opinion bearing on their state law fraud claims, with instructions for the court of appeals to certify to the Florida Supreme Court either the threshold choice of law issue or the substantive law issues on litigation conduct immunity and reasonable reliance. *See Massachusetts v. Feeney*, 429 U.S. 66 (1976) (certification ordered prior to noting probable jurisdiction); *Mills v. Rogers*, 457 U.S. 291, 305-06 (1982) (court of appeals decision vacated and remanded for consideration of the need for certification).

## II. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE TWO SHARP SPLITS AMONG THE CIRCUITS ON THE PROPER STANDARD OF PROOF REQUIRED TO ESTABLISH THAT A CIVIL RICO PLAINTIFF HAS BEEN INJURED "BY REASON OF" THE DEFENDANT'S RACKETEERING ACTIVITIES, AS REQUIRED BY 18 U.S.C. § 1964(c).

This petition presents two related questions – both of which arise frequently in RICO litigation – that have generated pronounced splits among the circuit courts throughout the country. The first question involves the proper application of this Court's holding in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). The second question centers on whether a civil RICO plaintiff who bases his claim on predicate acts of mail and wire fraud must show that he "reasonably relied" on misrepresentations made by the defendant. Both questions are closely related in that each turns on the proper interpretation of 18 U.S.C. § 1964(c), which requires that a RICO plaintiff establish that he suffered injury "by reason of" the defendant's racketeering.

The Petitioners submit that there is a substantial need for this Court to resolve the circuit splits generated by each of these questions because the circuit splits are now deeply entrenched and generate confusion both among, and within, the circuits. Petitioners further submit that this case is an excellent vehicle to use to resolve these circuit splits because it presents an opportunity for the Court to resolve both splits in the context of a single case.

### A. The Circuit Split Over The Proper Interpretation Of *Holmes v. Securities Investor Protection Corp.*

The Circuits are split on the proximate cause analysis applied to RICO claimants who were intended targets of a RICO enterprise's predicate acts but not the immediate victims of those illegal acts. In the subject opinion, the Eleventh Circuit joined a minority of Circuits that apply a categorical rule which very narrowly circumscribes the sphere of relief.

In *Holmes v. Securities Investor Protection Corp.*, the Court teaches that under RICO an evaluation of proximate cause is to be accomplished by ascertaining whether there is "some direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. 258, 268 (1992). Courts were directed to employ such a direct injury analysis based on several policy reasons, which counsel against permitting recovery by remote plaintiffs. Those reasons include: (1) the difficulty of proving damages to remote plaintiffs attributable to the alleged conduct rather than independent factors, (2) the necessity of adopting complicated rules apportioning damages among plaintiffs to lessen the risk of multiple recoveries for the same injuries, and (3) directly injured victims generally will bring suit to deter the injurious conduct without the difficulties of a suit by a remote plaintiff. *See id.* at 269.

While the Court in *Holmes* focused on the "directness" of an injury, the Court noted that recovery for indirect injury is not precluded under RICO. *See id.* at 272 n. 20 (noting that the term "direct" is merely a reference to the proximate cause inquiry that is informed by the subject policy concerns).

Nevertheless, the Circuits are decidedly split on the extent to which RICO claims are available to parties indirectly injured. A few circuits, including the Eleventh Circuit in the instant case, have interpreted *Holmes* to require a narrow approach, requiring a "convergence" between the defendant's acts of racketeering and the plaintiffs' injuries, meaning that only those plaintiffs who were the immediate recipients of the defendant's misrepresentations may recover from the defendant under RICO. *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003), *cert. denied*, 124 S.Ct. 532 (Nov. 10, 2003);[4] *Mylan Laboratories, Inc. v. Matikari*, 7 F.3d 1130, 1137 (4th Cir. 1993), *cert. denied sub nom., American Home Products Corp. v. Mylan Laboratories, Inc.*, 510 U.S. 1197 (1994); *Israel Travel Advisory Service v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924 (9th Cir. 1994). Even in cases where, as in this case, the plaintiff claims to be the direct, intended victim of the defendant's unlawful scheme, these circuits refuse to permit recovery due to the plaintiff's alleged inability to prove convergence.

A majority of circuits, however, have rejected the strict requirement of convergence in favor of an approach stressing the application of traditional "proximate cause"

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[4] Petitioners are cognizant of this Court's recent denial of the *Lerner* plaintiff's Petition for Certiorari filed in August 5, 2003, asserting grounds similar to those asserted herein. The instant petition provides a superior vehicle to address this vexatious issue, as the circumstances and allegations asserted here show no derivative injury, no difficulties attributing injury directly resulting from RICO predicate acts, no need for rules concerning apportionment of damages, and no claims by the immediate victims.

principles. *United States v. Christopher*, 142 F.3d 46 (1st Cir.), *cert. denied*, 525 U.S. 938 (1998); *United States v. Blumeyer*, 114 F.3d 758, 767-68 (8th Cir.) (rejecting convergence), *cert. denied*, 522 U.S. 938 (1997); *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990); *Procter & Gamble v. Amway*, 242 F.3d 539 (5th Cir. 2001); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied sub nom, Arthur Andersen & Co. v. Schacht*, 464 U.S. 1002 (1983); *Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993). Under this latter approach, injured plaintiffs who may not have directly received the defendant's misrepresentations, but who are nonetheless the intended and foreseeable victims of the defendant's unlawful scheme, are entitled to seek redress under RICO.

The allegations in the instant case reveal another error in the Eleventh Circuit's analysis with regard to Petitioners' relationship to the intended effect of the DuPont enterprise's predicate acts. Petitioners were immediately injured by DuPont's predicate acts obstructing justice in the *Bush Ranch* case: The intended targets were not only at the plaintiffs in that case, but at all Benlate claimants, including Petitioners here. DuPont knew that if it and its lawyers obeyed court and ethical rules in *Bush Ranch* and honestly represented the Alta tests results and produced the Costa Rica tests, the merits (and value of) Plaintiffs' case and the hundreds of other Benlate claimants' cases would improve substantially. E.g., App. at 125, ¶2. Thus, Respondent's RICO predicate acts had a far wider target than just the *Bush Ranch* plaintiffs. *It simply defies logic to say a scheme to cheat all mass tort litigants is directed only to the first case.* The split among

the Circuits needs to be resolved as to this causation analysis.

### B. The Circuit Split Over The Question Of Whether "Reasonable Reliance" Is A Required Element Of A RICO Claim Based On Mail And Wire Fraud.

There is also a distinct split among the Circuits on the question of what constitutes adequate proof that a Civil RICO plaintiff suffered injury "by reason of" the defendant's racketeering activities, as required by 18 U.S.C. § 1964(c), when the racketeering activities consisted of predicate acts of mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343). This split among the Circuits is acknowledged by the Circuits themselves; *See, e.g., Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 104 n. 3 (1st Cir. 2002).

On one side of the split, some circuits adhere to an inflexible rule requiring, without exception, that a plaintiff alleging a Civil RICO claim based on mail and wire fraud prove that " 'a reasonably prudent person would have been deceived by [the defendant's] misrepresentation.' " App. at 24 (quoting *Pelletier v. Zweifel*, 921 F.2d 1465, 1503 (11th Cir. 1991)); *see also, County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2nd Cir. 1990); *Chisholm v. Transouth Financial Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Central Distributors of Baer, Inc. v. Connecticut*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994); *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286-87 (8th Cir. 1994).

Other circuits have refused to import a reliance element into 18 U.S.C. § 1341's "by reason of" requirement; instead favoring a more flexible approach requiring the plaintiff to show that the defendant's fraud was the "proximate cause" of the plaintiff's injury. *Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 104 (1st Cir. 2002); *Tabas v. Tabas*, 47 F.3d 1280, 1294 n. 18 (3d Cir. 1995) ("Defendants' assertion that the mailings involved must themselves be relied upon by the victim of the fraud in order for a RICO claim to be established is inaccurate."); *Procter & Gamble*, 242 F.3d at 564 (reliance not required if "other elements of proximate causation are present.").[5]

Petitioners believe that the second, more flexible, approach based on proximate causation is the better reasoned approach. First, this flexible approach is more consistent with the plain language of the RICO statute, specifically § 1964(c), which does not expressly require reliance. It is also most consistent with the plain language of the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, neither of which require a showing of reliance; *id.*; a fact that formed the basis of this Court's opinion in *Neder v. United States*, 527 U.S. 1, 24 (1999) ("The common law

[5] The Fifth Circuit has waffled on the question of whether reliance is required, first holding that no reliance is required in a civil RICO case; *Armco Industries Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 481-2 (5th Cir. 1986); and later holding that reliance is required. *Summit Properties, Inc. v. Hoechst Delanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000). Subsequent to *Summit Properties*, however, the Fifth Circuit once again retreated from the requirement of reliance, stating that a plaintiff can prevail on a RICO claim in the absence of proof of reliance, provided "other elements of proximate causation are present." *Procter & Gamble*, 214 F.3d at 558-62.

requirement[] of 'justifiable reliance' [has] no place in the federal [mail and wire] fraud statutes.").

Second, the flexible approach is consistent with common sense, which demonstrates that, while reliance is one method by which a plaintiff can prove damage "by reason of" the defendant's conduct, it is not the only way of doing so. *See, Systems Management*, 303 F.3d at 104. Third, the flexible approach is most consistent with this Court's decision in *Holmes v. Securities Investor Protection Corp., supra*, in which the Court held that traditional notions of proximate causation should be used because "[t]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." 503 U.S. at 274 n. 20; *see also, id.* at 267-8.

Finally, the more flexible approach is most consistent with Congress' intent that the civil RICO statute combat racketeering by providing victims of racketeering with means of redress that did not previously exist under state and federal law. By providing new means of redress in this fashion, the civil RICO statute divests racketeers "of the fruits of [their] ill-gotten gains." *United States v. Turkette*, 452 U.S. 576, 585 (1981); *Russello v. United States*, 464 U.S. 16, 27 (1983) (purpose of RICO to provide "new legal weapons" to battle racketeering). This Congressional purpose is subverted by requiring plaintiffs to make a showing of reasonable reliance, as the Eleventh Circuit did in this case. If reasonable reliance is required, the Civil RICO statute becomes no more useful a tool for combating racketeering than state common law torts. Indeed, the Eleventh Circuit readily admits that requiring a civil RICO plaintiff to prove reasonable reliance is the same

showing "required for establishing common law fraud." App. at 24.

Petitioners in this case had their civil RICO claims dismissed by the Eleventh Circuit, which first demanded that they make a showing of reasonable reliance, and then held, as a matter of its interpretation of Florida law, that the Petitioners were unable to make such a showing. App. at 23-25. Not only was the circuit court wrong in concluding that the Plaintiffs could not, as a matter of law, establish reasonable reliance,[6] but it should not have demanded such a showing in the first place. Instead, the circuit court should have applied the more flexible approach applied in other circuits – and which is most consistent with this Court's decision in *Holmes* – requiring only that the plaintiffs establish that DuPont's egregious racketeering activities were the proximate cause of the Petitioners' injuries.

There is a substantial need for the Court to resolve the circuit split described above as soon as possible. The split has come to a head in the past two years, as

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[6] The Eleventh Circuit based this determination on its interpretation of Florida state law. Petitioners contend that, even if a showing of reasonable reliance is required by RICO, the circuit court erred because: (a) federal common law principles should govern the determination of whether a plaintiff can reasonably rely on the defendant's fraud; (b) even if state law governs this determination, the law of Delaware, not Florida, governs this case because the contracts at issue in this case contain a Delaware choice of law provision (*see* Section I above); (c) the Eleventh Circuit's interpretation of Florida state law is, at best, a guess at the meaning of Florida law, and that the circuit court should have certified the state law question to the Florida Supreme Court, consistent with the principles of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

evidenced by the First Circuit's clear refusal, in the *Systems Management* case, to require a showing of reliance, and the Eleventh Circuit's re-affirmation of its requirement of reasonable reliance in its decision in this case. Petitioners thus respectfully submit that this Court should grant certiorari in this case to resolve the circuit split.

## CONCLUSION

Based upon the foregoing reasons, the writ of *certiorari* should be granted. In the alternative, the decision below should be summarily reversed and remanded.

Respectfully submitted,

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# APPENDIX

2003 WL 21949591 (11th Cir.(Fla.))

GREEN LEAF NURSERY, GUS PENA,
Plaintiffs – Counter-Defendants – Appellants,
v.
E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware Corporation, Defendant – Counter-Claimant – Appellee.

Nos. 01-13345, and 01-15693 D.C.
Docket Nos. 98-02256 CV-ASG No. 99-00336 CV-ASG

United States Court of Appeals, Eleventh Circuit.

(August 15, 2003)

Appeals from the United States District Court for the Southern District of Florida

Before BIRCH, DUBINA and KRAVITCH, Circuit Judges.

DUBINA, Circuit Judge:

In the early 1990's, plant growers throughout the country filed hundreds of lawsuits against E.I. DuPont De Nemours and Company ("DuPont") alleging fraud and products liability relating to the DuPont fungicide Benlate. In 1992, Green Leaf Nursery, Inc., a Florida plant nursery, and its owner ("Plaintiffs") brought such a suit against DuPont in Florida state court (the "Underlying Litigation"). In May 1994, notwithstanding ongoing accusations of discovery fraud and litigation misconduct in Plaintiffs' own case and in other Benlate cases throughout the country, which Plaintiffs' counsel monitored, Plaintiffs settled their claims with DuPont, executed a general

release, and dismissed their Florida state court action with prejudice in August, 1995.[1]

Plaintiffs contend that after settling their case, they discovered that DuPont had engaged in a massive scheme of perjury, falsification of evidence, and fraudulent concealment of evidence to induce themselves and other Benlate plaintiffs to settle their claims for less than the claims' fair value. Although Plaintiffs accepted and kept the settlement monies, affirming the settlement agreement, they filed the present action against DuPont alleging fraud and violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), codified at 18 U.S.C. § 1961 *et seq.*[2] The district court dismissed Plaintiffs' claims in two orders and entered judgment in favor of DuPont that Plaintiffs appealed separately. We consolidate these appeals and affirm the district court's judgment.

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[1] Many other commercial nurseries and growers also settled their Benlate litigation with DuPont, executing releases and dismissing their actions with prejudice.

[2] Plaintiffs' first amended complaint contained the following thirteen claims for relief: (1) fraud, (2) intentional nondisclosure of material facts, (3) fraudulent inducement to settle, (4) fraud on the court under Federal Rule of Civil Procedure 60(b), (5) rescission and damages for fraud, (6) racketeering in violation of 18 U.S.C. § 1962(c), (7) violation of 18 U.S.C. § 1962(d) by conspiracy to violate 18 U.S.C. § 1962(c), (8) conspiracy, (9) abuse of process, (10) infliction of emotional distress, (11) interference with prospective economic advantage, (12) spoliation of evidence, and (13) violation of the Florida Deceptive and Unfair Trade Practices Act. Plaintiffs' case was consolidated in the district court with multiple similar cases in which plaintiffs accuse DuPont of fraud in previous Benlate settlements.

## BACKGROUND

### A. The *Bush Ranch* Case

By the mid-1990's, many growers had filed lawsuits against DuPont contending that Benlate was defective and caused damage to their crops and nurseries. Plaintiffs monitored many of these cases, including one of the first cases to proceed to trial, *In re E.I. du Pont de Nemours & Co. – Benlate Litigation,* 918 F.Supp. 1524 (M.D.Ga.1995), *rev'd,* 99 F.3d 363 (11th Cir.1996), which is known as the *Bush Ranch* case. In the *Bush Ranch* case, the district court sanctioned DuPont in excess of $100 million, finding that DuPont had committed fraud on the court. On appeal, we held that the sanctions imposed were punitive, and thus criminal in nature, so that the district court's imposition of sanctions in a civil proceeding without the constitutional protections accorded criminal defendants was improper. 99 F.3d at 369. Accordingly, we reversed the district court's sanction order and remanded the case for further proceedings. *Id.* at 373.

### B. Other Settlement-Fraud Cases

The Plaintiffs were not alone in filing settlement-fraud cases. The first Benlate settlement-fraud cases to be litigated through judgment and appeal were damages actions brought in the Northern District of Georgia by several of the plaintiffs in the *Bush Ranch* case. *See Kobatake v. E.I. DuPont De Nemours & Co.,* 162 F.3d 619 (11th Cir.1998) (per curiam). This court affirmed the district court's dismissal of the settlement-fraud claims based on the general release and the plaintiffs' inability to prove reasonable reliance due to the merger clauses in the plaintiffs' affirmed settlement agreements. *Id.* at 622.

Similarly, a district court in the Southern District of Florida dismissed several settlement-fraud cases based on the release clauses contained in the settlement agreements, including settlement agreements containing Delaware choice-of-law clauses identical to those found in Plaintiffs' settlement agreements. The Florida cases involved two groups of settlement-fraud plaintiffs: (1) those who had settled in 1994 and executed settlement agreements containing Delaware choice-of-law clauses; and (2) those who had settled in late 1991 and early 1992 without having filed any litigation against DuPont and who had signed settlement agreements that did not contain choice-of-law clauses.

Appeals of these Florida district court decisions resulted in the certification of questions of Florida law to the Supreme Court of Florida. *See Foliage Forest, Inc. v. E.I. Dupont De Nemours & Co.,* 172 F.3d 1284 (11th Cir.1999); *Mazzoni Farms, Inc. v. E.I. Dupont De Nemours & Co.,* 166 F.3d 1162 (11th Cir.1999). We certified the following two questions to the Supreme Court of Florida: (1) what is the effect of the choice-of-law clause, and (2) what is the construction of the release clauses in any settlement agreements governed by Florida, rather than Delaware, law. The Florida Supreme Court ruled that where a settlement-fraud plaintiff affirms a release, the choice-of-law clause is valid and governs the construction of the release, but in those cases where no choice-of-law clause exists, the release language is not sufficiently broad to bar fraudulent inducement claims. *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.,* 761 So.2d 306, 313, 316

(Fla.2000). Accordingly, we reversed the district court's orders dismissing the actions as barred by the release and remanded the cases.[3]

C. The Instant Action

Plaintiffs settled their Underlying Litigation in May 1994, executing a general release. In August 1995, the Florida trial court dismissed with prejudice the Plaintiffs' Florida state court action. The settlement agreement provided that

> [i]n consideration of [DuPont's] payment of the amount set forth in the authorization previously signed by Plaintiff[s], Plaintiff[s] hereby release [ ] [DuPont] from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Plaintiff[s] ever had, now [have], or may hereafter have against [DuPont], by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed (including, but not limited to, the claims asserted and sought to be asserted in the Action).

[R. Vol. 3 Tab 208 Ex. C]. The settlement agreement also contains a choice-of-law clause that states: "This Release shall be governed and construed in accordance with the

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[3] We expressly stated that, upon remand, the district court should consider DuPont's arguments with regard to justifiable reliance. *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 223 F.3d 1275, 1276 n.2 (11th Cir.2000).

laws of the State of Delaware without giving effect to the choice-of-law provisions thereof." [R. Vol. 3 Tab 208 Ex. C].

Plaintiffs allege that the discovery abuses and litigation misconduct in the *Bush Ranch* case and other cases that they monitored along with the discovery abuses in their own case represent a scheme to induce them to settle their case for less than the fair value of their claims. Specifically, the Plaintiffs allege that DuPont fraudulently concealed information allegedly showing defects in Benlate in the Underlying Litigation.[4] Plaintiffs also allege that DuPont issued fraudulent discovery responses, put forth perjured testimony, and engaged in other allegedly dishonest litigation conduct. Plaintiffs claim that in reliance on DuPont's actions in the Underlying Litigation and in the other Benlate cases, which they monitored, they suffered damages. Therefore, Plaintiffs filed this settlement-fraud action more than three years after settling the Underlying Litigation and the *Bush Ranch* case.

During the pendency of the Florida certification proceedings from the other settlement-fraud cases, DuPont moved for judgment on the pleadings in the instant action. DuPont also moved, in a related case involving similarly situated plaintiffs, for certification to the Supreme Court of Delaware of the issue of whether the release barred such settlement-fraud actions. The district court granted DuPont's motion for certification in the related case and stayed all proceedings in this and all

[4] This allegation is similar to Plaintiffs' allegation in the Underlying Litigation that DuPont fraudulently concealed information showing defects in Benlate.

other related cases pending the resolution of the certified question. The district court certified the following question to the Supreme Court of Delaware: "Under Delaware law, does the release in these settlement agreements bar Plaintiffs' fraudulent inducement claims?" *E.I. DuPont De Nemours & Co. v. Florida Evergreen Foliage,* 744 A.2d 457, 459 (Del.1999). The Delaware Supreme Court answered that, under Delaware law, the release clause did not unambiguously bar the plaintiffs' fraudulent inducement claims. *Id.* at 461. The court held that

> a tort claimant fraudulently induced to execute a release may opt either for rescission or a separate suit for fraud with damages calculated on the difference between that received under the release and the value of the settlement or recovery achieved had there been no fraud by the released party.

*Id.* at 458.

The district court then ruled on DuPont's motion for judgment on the pleadings. DuPont had moved for judgment on the pleadings on all of Plaintiffs' claims except for their spoliation claim. In an order dated March 8, 2001, the district court found that Florida law governed Plaintiffs' tort claims and dismissed all of Plaintiffs' state law claims as barred by Florida's litigation privilege. *Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.,* 135 F.Supp.2d 1271, 1278, 1283 (S.D.Fla.2001). As an alternative basis for dismissing Plaintiffs' state law fraud claims,[5]

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[5] Plaintiffs' state law fraud claims included Count One – fraud, Count Two – intentional nondisclosure of material facts, Count Three – fraudulent inducement to settle, and Count Five – rescission and

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the district court found that Plaintiffs had not reasonably relied on any misrepresentations by DuPont. *Id.* at 1297. The district court denied DuPont's motion for judgment on the pleadings as to Plaintiffs' federal RICO claims. *Id.* at 1289. The district court certified its order for interlocutory review, *id.* at 1297-98, and we granted Plaintiffs' petition for interlocutory review on June 21, 2001.

In the meantime, on May 9, 2001, DuPont filed motions for judgment on the pleadings as to those claims not disposed of by the district court's March 8, 2001, order – Plaintiffs' federal RICO and spoliation claims. Plaintiffs filed a motion for leave to amend their first amended complaint on August 1, 2001, two days before the scheduled oral argument on DuPont's motions for judgment on the pleadings as to the federal RICO and spoliation claims. The proposed amendment sought to revise the factual allegations of the complaint, eliminate certain claims upon which the district court had already ruled,[6] and add two Florida RICO claims.

On August 24, 2001, the district court granted DuPont's motions, dismissing Plaintiffs' remaining claims. The district court found that the Plaintiffs failed to "adequately allege justifiable reliance on acts of mail and/or

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damages for fraud. Count Five's rescission claim sought to recover damages for fraud. Thus, the district court specifically dismissed that claim as well. *See Reynolds v. The Surf Club,* 473 So.2d 1327, 1337 (Fla.Dist.Ct.App.1985) (rejecting a claim for rescission for fraud where no "reasonable reliance" occurred).

[6] Plaintiffs wished to delete their claims for infliction of emotional distress, interference with prospective economic advantage, and violation of the Florida Deceptive and Unfair Trade Practices Act.

wire fraud," and did not "adequately state[ ] sufficient proximate cause between the alleged acts of obstruction of justice and witness tampering" in the *Bush Ranch* case and the Plaintiffs' injuries. *Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.*, 165 F.Supp.2d 1345, 1356 (S.D.Fla.2001). As a result, the district court found that Plaintiffs' federal RICO claims failed for lack of any valid predicate acts.[7] *Id.* The district court found that Plaintiffs' spoliation claim failed because Plaintiffs neither alleged facts sufficient to show a significant impairment in the ability to prove their underlying case, nor alleged facts sufficient to demonstrate the required causal link between the destruction of evidence and their alleged damages. *Id.* at 1361.

In the August 24, 2001 order, the district court also denied Plaintiffs' motion for leave to amend their complaint, finding that it lacked jurisdiction to allow the amendment because of the pending interlocutory appeal in this court. *Id.* at 1362-63. The district court entered final judgment on September 4, 2001. Plaintiffs then perfected these appeals.

## ISSUES

1. Whether the district court properly found that Florida law applied to the elements of Plaintiffs' tort claims.

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[7] As an alternative basis for dismissing Plaintiffs' RICO claims, the district court found that section 107 of the Private Securities Litigation Reform Act of 1995, 18 U.S.C. § 1964(c), barred Plaintiffs' RICO claims. *Florida Evergreen Foliage*, 165 F.Supp.2d at 1356-59.

2. Whether the district court properly found that Florida law, which provides an immunity in civil damages suits for the conduct of parties, witnesses, and lawyers in prior litigation, bars Plaintiffs' current tort claims.

3. Whether the district court properly found that Plaintiffs could not have reasonably relied upon DuPont's alleged misrepresentations because of the accusations of fraud, misconduct, and dishonesty permeating the Underlying Litigation.

4. Whether the district court properly granted judgment on the pleadings in favor of DuPont on Plaintiffs' federal RICO claims.

5. Whether the district court properly granted judgment on the pleadings in favor of DuPont on Plaintiffs' spoliation claims.

6. Whether the district court abused its discretion in denying Plaintiffs' motion for leave to amend their complaint.

## STANDARDS OF REVIEW

"We review a judgment on the pleadings *de novo.*" *Jones v. NordiTrack, Inc.,* 236 F.3d 658, 660 (11th Cir.2000). We review a district court's denial of a motion to amend a complaint for an abuse of discretion. *Compagnoni v. U.S.,* 173 F.3d 1369, 1371 n. 7 (11th Cir.1999).

## DISCUSSION

### A. *Choice-of-Law*

The district court applied two rules in dismissing Plaintiffs' fraud and other tort claims: (1) the rule that

parties have absolute immunity against damages claims based on litigation conduct, as announced in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co.,* 639 So.2d 606, 608 (Fla.1994), and (2) the rule that a settlement fraud claimant cannot prove reasonable reliance on a party's misrepresentations if he settles a dispute involving accusations that the other party was guilty of fraud or other dishonest conduct, as articulated in *Mergens v. Dreyfoos,* 166 F.3d 1114, 1118 (11th Cir.1999). Plaintiffs argue extensively that the district court erred in its application of these two rules because the law of Delaware, rather than Florida, governs Plaintiffs' state law claims. Plaintiffs contend that the choice-of-law clause in the settlement agreement, *Mazzoni Farms,* and *Florida Evergreen Foliage* all dictate that Delaware law applies to their tort claims.

The choice-of-law clause provides that "[t]his release shall be governed and construed in accordance with the laws of the State of Delaware. . . ." [R. Vol. 3 Tab 208 Ex. C]. The effect of this clause is narrow in that only the release itself is to be construed in accordance with the laws of the State of Delaware. The clause does not refer to related tort claims or to any and all claims or disputes arising out of settlement or arising out of the relationship of the parties. This type of narrow choice-of-law clause calls for the application of the selected law to determine only the scope and effect of the release. Here, Plaintiffs seek monetary damages rather than a form of relief that would actually affect the release, such as avoidance. *See Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.,* 133 F.3d 1405, 1409-10 (11th Cir.1998) (explaining that a provision stating that a contract was "governed by" Illinois law did not incorporate Illinois tort law); *Krock v. Lipsay,* 97 F.3d

640, 645 (2d Cir.1996) (concluding that a choice-of-law clause providing that the contract "shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts" did not encompass fraud claims for damages); *Sunbelt Veterinary Supply, Inc. v. International Bus. Sys. U.S., Inc.,* 985 F.Supp. 1352, 1354 (M.D.Ala.1997) (explaining that a clause stating that a contract would be "governed by and construed under" California law was not broad enough to prevent application of the forum state's tort law); *Burger King Corp. v. Austin,* 805 F.Supp. 1007, 1012 (S.D.Fla.1992) (explaining that "claims arising in tort are not ordinarily controlled by a contractual choice of law provision. . . . Rather, they are decided according to the law of the forum state") (internal quotation omitted). Thus, the Delaware Supreme Court applied Delaware law only in determining the effect of the release, and held that the release did not bar Plaintiffs' fraudulent inducement claims. *Florida Evergreen Foliage,* 744 A.2d at 461.

Plaintiffs argue that *Mazzoni Farms* had already established that Delaware law governs the substantive elements of their claims. In *Mazzoni Farms,* this court certified to the Florida Supreme Court the question of whether the choice-of-law provision controls the release provisions of the settlement agreement. 166 F.3d at 1165. The court answered that the choice-of-law provision does control the release provisions of the settlement agreement and that Delaware law should be applied to determine whether the release barred Plaintiffs' fraudulent inducement claim. *Mazzoni Farms,* 761 So.2d at 316. The Supreme Court of Delaware, in turn, held that the release in question does not bar fraudulent inducement claims. *Florida Evergreen Foliage,* 744 A.2d at 461.

Neither *Mazzoni Farms* nor *Florida Evergreen Foliage,* however, dealt with the question of what state's substantive law should be applied to the Plaintiffs' tort claims. The Florida Supreme Court in *Mazzoni Farms* did not address what state's laws would govern the elements of any tort claims not barred by the release, and the Delaware Supreme Court in *Florida Evergreen Foliage* did not address the scope of the choice-of-law clause, the law applicable to the fraudulent inducement claims not barred by the release, or any other conflicts issues. Rather, *Mazzoni Farms* and *Florida Evergreen Foliage* dealt with whether the tort claims were still viable in light of the release. Therefore, neither *Mazzoni Farms* or *Florida Evergreen Foliage* determined that Delaware law governs the substantive elements of Plaintiffs' claims, as they contend.

Because the choice-of-law provision is narrow and governs only the scope and effect of the release, we turn to the choice-of-law rules of the forum state, Florida, to determine the applicable law governing the Plaintiffs' tort claims. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941).

Florida utilizes the "most significant relationship" test to determine which state's laws applies to tort claims. *Garcia v. Public Health Trust of Dade County,* 841 F.2d 1062, 1064-65 (11th Cir.1988) (explaining that Florida follows the approach set forth in the Restatement, which states that "[t]he rights and liability of the parties with respect to an issue in *tort* are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties" and that contacts to be taken into account include "(a) the place where the injury occurred, (b) the place where the

conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered") (quoting Restatement (Second) Conflict of Laws § 145 (1971)). All of the Plaintiffs are residents of Florida. The Underlying Litigation, which Plaintiffs allege that they were fraudulently induced to settle, was brought in a Florida state court by Florida counsel and Plaintiffs settled their Underlying Litigation in Florida. Therefore, Florida, the forum state, has the most significant contacts and relationship to Plaintiffs' tort claims. Accordingly, we conclude that the district court properly found that Florida law governs Plaintiffs' tort claims.

*B. Immunity For Litigation Conduct*

In *Levin,* the Florida Supreme Court concluded that the litigation privilege precluded all tort claims based on a party's conduct during the course of litigation, holding that "any act occurring during the course of a judicial proceeding" is entitled to absolute immunity "so long as the act has some relation to the proceeding." *Levin,* 639 So.2d at 608.[8] However, this rule does not leave parties without a

[8] This court had certified the following question to the Florida Supreme Court:

> Whether certifying to a trial court an intent to call opposing counsel as a witness at trial in order to obtain counsel's disqualification, and later failing to subpoena and call counsel as a witness at trial, is an action that is absolutely immune from a claim of tortious interference with a business relationship by virtue of Florida's litigation privilege.

639 So.2d at 607.

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remedy for misconduct occurring during or relating to litigation. For example, "a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice." *Id.* at 608-09. The Florida Supreme Court recognized the trial court's inherent power as a reason for favoring an absolute immunity for litigation conduct. *Id.* For example, in this case, Plaintiffs could have filed a contempt motion before the trial court in the Underlying Litigation as a remedy for DuPont's misconduct. Plaintiffs chose instead to pursue fraud actions in subsequent litigation, which is precisely the strategy that the Florida Supreme Court

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The Florida Supreme Court answered affirmatively in *Levin,* concluding that the public's right to a free and full disclosure of the facts in the conduct of judicial proceedings favored extending the privilege traditionally afforded to any defamatory statements made in the course of judicial proceedings to any act related to a judicial proceeding. 639 So.2d at 607-08. The *Levin* court explained:

> In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

*Id.* at 608.

intended to preclude by announcing the *Levin* rule. *Id.* at 608.

Plaintiffs allege that in the Underlying Litigation and in other Benlate cases, DuPont, among other things, failed to respond to or issued improper responses to discovery, gave untruthful testimony, submitted improper or obstructive motions, committed misconduct during the trial of a case, disobeyed court orders, and took false litigation positions. These acts related to the Underlying Litigation. Thus, under *Levin,* we conclude that the district court properly found that DuPont was entitled to immunity for these actions in this subsequent civil fraud action.

Because the Plaintiffs' claims in this case depend on acts with "some relation" to the Underlying Litigation, Florida law is clear and provides an absolute immunity for the conduct upon which Plaintiffs' claims are based. *See Rushing v. Bosse,* 652 So.2d 869, 876 (Fla.Dist.Ct.App.1995) (concluding that absolute immunity would be awarded for conduct involving a violation of Florida Rule of Judicial Administration 2.060(d) because such conduct is related to the judicial proceedings); *Donner v. Appalachian Ins. Co.,* 580 So.2d 797, 798 (Fla.Dist.Ct.App.1991) (finding that alleged fraudulent misrepresentations made during discovery in a previous action were entitled to absolute immunity).

Plaintiffs assert that the holding of *Levin* is that "Florida courts should not look behind lawful, tactical decisions of a trial lawyer or a litigant to establish tortious injury." [Appellants' Opening Brief p. 30]. However, *Levin* itself involved a claim of intentional abuse of litigation procedures. Plaintiffs contend that DuPont's misconduct is distinguishable from that type of conduct afforded immunity

because DuPont's decisions to offer perjured testimony, conceal evidence, and falsify discovery were not lawful. However, the Florida Supreme Court held that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding." *Levin,* 639 So.2d at 608. The inclusion of the phrase "such as the alleged misconduct at issue" does not negate or limit the holding of *Levin,* which affords immunity to "any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding." *Id.*

Plaintiffs also argue that the ruling in *Mazzoni* demonstrates that Florida's litigation privilege does not protect litigation misconduct against claims for fraudulent inducement. In *Mazzoni,* the Florida Supreme Court considered the release and whether it barred fraudulent inducement claims. The court held that where the defrauded party elects to affirm the settlement agreement and sue for damages, the choice-of-law provision shall be enforced. The court further held that, in those cases where the settlement agreements do not contain a choice-of-law provision, Florida law controls and the release language is not sufficiently broad to bar fraudulent inducement claims. *Mazzoni,* 761 So.2d at 313, 316 n.9. The Supreme Court of Florida did not discuss the litigation privilege or the reasonable reliance rule because it dealt only with the scope and effect of the releases, rather than the merits of the substantive elements of the fraud claims. As a result, *Mazzoni* has no bearing on the application of the litigation privilege.

Citing *Fridovich v. Fridovich,* 598 So.2d 65 (Fla.1992), Plaintiffs also argue that because of the egregious nature of DuPont's misconduct, any litigation privilege should be qualified and should not protect DuPont from claims for fraud. In *Fridovich,* the Supreme Court of Florida held that, even though defamatory statements made in the course of judicial proceedings are absolutely privileged, defamatory statements made to the authorities *prior* to the institution of criminal charges were only entitled to a qualified immunity, which was sufficiently overcome by the egregious facts of the case. 598 So.2d at 66, 68-69. The district court correctly distinguished *Fridovich* from the instant action because of the timing of the egregious conduct in question.[9] Because DuPont's alleged misconduct occurred *during* the Underlying Litigation and during other Benlate litigation, according to *Levin,* Florida law clearly provides an absolute immunity to DuPont for their alleged misconduct.[10] *Levin,* 639 So.2d at 608 (emphasis added).

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[9] The "primary question" facing the Supreme Court of Florida in *Fridovich* was "whether defamatory statements made to the authorities *prior* to the initiation of criminal proceedings are absolutely privileged as within the course of judicial proceedings." 598 So.2d at 66.

[10] Plaintiffs also argue that three Florida trial courts have refused to extend litigation immunity to DuPont's alleged misconduct. *See Gilley v. Friedman, Rodriguez, Ferraro & St. Louis, P.A.,* Case No. 98-2781-CA, *Foliage Corp. of Fla., Inc. v. Friedman, Rodriguez, Ferraro & St. Louis, P.A.,* Case No. C10 00-5782, *Productura v. DuPont,* Case No. 97-12186 CA 23. However, these cases involve factually distinguishable situations. Also, in *Gilley,* the court issued only summary denials of the motion to dismiss and motion for summary judgment, neither of which offer guidance as to why the motions were denied. Plaintiffs also cite *Hatcher v. Dixon,* 660 So.2d 1105 (Fla.Dist.Ct.App.1995), for the proposition that the litigation privilege does not extend to fraudulent

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*C. Reasonable Reliance*

The district court found, as an alternative basis for dismissing Plaintiffs' state-law fraud claims, that Plaintiffs failed to demonstrate the necessary reliance on DuPont's misrepresentations.[11] In *Mergens,* this court followed prior circuit precedent dealing with Florida law and articulated a bright line rule regarding reliance. "'When negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties.'" *Mergens,* 166 F.3d at 1118 (quoting *Pettinelli v. Danzig,* 722 F.2d 706, 710 (11th Cir.1984)).

This court found that reliance was unjustified as a matter of law in *Mergens* because the plaintiffs were sophisticated "players" in the industry and were represented by counsel, the parties had been in an adversarial relationship since well before the execution of the agreement, and the existing controversy between the parties involved allegations of fraud and/or dishonesty by the defendants. 166 F.3d at 1118.

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inducement claims based on litigation misconduct. However, *Hatcher* dealt with misconduct occurring during settlement negotiations rather than misconduct occurring during the course of settled litigation, and *Hatcher* merely made an assumption, which was dicta, without deciding that the "'litigation privilege' does not extend to settlement negotiations." 660 So.2d at 1108; *see also Kobatake,* 162 F.3d at 626 & n.8 (discussing the difference between settlement negotiations and discovery). None of these cases weaken the absolute immunity rule announced in *Levin.*

[11] Justifiable reliance is an element of fraud under Florida law. *Hillcrest Pac. Corp. v. Yamamura,* 727 So.2d 1053, 1055 (Fla.Dist.Ct.App.1999); *see also Pettinelli v. Danzig,* 722 F.2d 706, 709 (11th Cir.1984) (listing the elements of fraud under Florida law).

Likewise, in the instant action, Plaintiffs are individual growers and incorporated nurseries who were represented by counsel throughout the Underlying Litigation. In addition, Plaintiffs' counsel monitored other Benlate cases throughout the country and knew that DuPont had been accused of discovery abuses in other cases. The pleadings indisputably establish that the parties were in an antagonistic relationship, in which the settled litigation involved claims of actual fraud against DuPont, as well as ongoing accusations of discovery fraud and other dishonest litigation conduct. Plaintiffs allege fraudulent conduct and misrepresentations on behalf of DuPont both in this action and in the Underlying Litigation. For example, in the Underlying Litigation, Plaintiffs alleged that DuPont intentionally concealed Benlate's defects, made false statements to the Environmental Protection Agency, and made false and misleading statements in public about the fitness of Benlate. In the current action, Plaintiffs allege that DuPont carried out a scheme intentionally to conceal material information regarding Benlate's defects from the court and opposing parties, including Plaintiffs. Both the past and current claims involve the same type of fraudulent conduct.

Plaintiffs argue that the fact that the conduct in this case took place during litigation renders their reliance reasonable.[12] Simply because the misrepresentations

[12] Plaintiffs also assert that the allegation that they reasonably relied upon DuPont's alleged misrepresentations must be accepted as true because DuPont made motions for judgment on the pleadings. The district court correctly found that it need not accept this conclusory legal allegation as true in deciding a Rule 12 motion. *Honduras Aircraft*

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occurred during litigation does not render reliance upon them reasonable. This is especially so given the extremely adversarial positions of the parties in the Underlying Litigation and the large number of cases around the country, which the Plaintiffs were continually monitoring, in which Dupont was being accused of discovery violations involving the concealment and destruction of evidence.

Plaintiffs further argue that their reliance was reasonable because they acted with due diligence in requesting specific materials through discovery. To argue in the abstract that litigants should be able to rely on an opponent to tell the truth in discovery responses is not enough to make reliance upon an opponent's representations reasonable in a separate fraud claim for damages. Rules exist emphasizing the importance of truth in the discovery process and the need for a litigant to be able to rely upon the opposing party's discovery responses. Indeed, Rule 26 of the Federal Rules of Civil Procedure imposes "an affirmative duty to engage in pretrial discovery in a responsible manner." Fed.R.Civ.P. 26(g) advisory committee's notes ("[T]he signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.").[13] Rule 26 explicitly encourages the imposition of sanctions for violations of the rule. However, a general entitlement to rely on a representation is not enough to

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*Registry, Ltd. v. Government of Honduras,* 129 F.3d 543, 545 (11th Cir.1997).

[13] Florida Rule of Civil Procedure 1.280, the Florida counterpart to Rule 26 of the Federal Rules of Civil Procedure, does not contain a corresponding certification requirement.

make a party's reliance reasonable in support of a fraud claim. Plaintiffs have admitted that they did not trust DuPont and were making and monitoring accusations that DuPont was not telling the truth in discovery responses. *Mergens* itself involved duties to disclose arising under the federal securities laws. 166 F.3d at 1116. Although conduct, such as DuPont's alleged conduct in the Underlying Litigation, may merit criminal sanctions, being held in contempt of court, bar admonitions, or even the trial court's setting aside of the judgment, the Plaintiffs chose to pursue a separate claim of fraud. To state a separate claim of fraud, they must demonstrate reasonable reliance even if the representations occurred during the litigation. Plaintiffs' repeated accusations of DuPont's cover-up regarding its product Benlate and Plaintiffs' repeated challenges to DuPont's conduct as fraudulent indicate that their reliance was not reasonable. Because Plaintiffs were represented by counsel, were in an antagonistic and distrusting relationship with DuPont, and settled litigation that included accusations of fraud and other dishonest conduct by DuPont, Plaintiffs could not reasonably or justifiably rely on any of DuPont's misrepresentations. *See id.* at 1118. Therefore, we conclude that the district court properly dismissed the Plaintiffs' fraud claims.[14]

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[14] The parties submitted *Matsuura v. E.I. du Pont de Nemours & Co.*, 73 P.3d 687 (Hawaii July 29, 2003), as supplemental authority. In *Matsuura,* faced with facts similar to the present case, the Supreme Court of Hawaii held that under Hawaii law a party is not immune from liability for fraudulent conduct engaged in during prior litigation. The court further held that a plaintiff is not precluded as a matter of law from establishing reasonable reliance on representations even when the plaintiff accused the defendant of fraud and dishonesty during the course of prior dealings. Although *Matsuura* is contrary to

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*D. Plaintiffs' RICO Claims*

Plaintiffs allege that DuPont carried out a scheme to defraud Plaintiffs into settling their Underlying Litigation for less money than they would have otherwise been able to obtain by withholding information and making false statements from 1991 through the filing of the present action in 1998. Plaintiffs allege that this conduct violated RICO, specifically 18 U.S.C. § 1962.

Section 1962 provides, in part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962. Plaintiffs in a civil RICO action must identify and prove a pattern of racketeering activity, which is defined as two predicate acts of racketeering activity within a ten-year period. 18 U.S.C. § 1961(5). Plaintiffs allege that mail fraud, in violation of 18 U.S.C. § 1341; wire fraud, in violation of 18 U.S.C. § 1343; obstruction of justice,

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the rules applied by the district court in the present case, we are bound by the substantive law of Florida, not the substantive law of Hawaii. In addition, the Supreme Court of Hawaii noted that its holding was contrary to the holdings of other jurisdictions on these issues, specifically citing *Levin* and *Mergens* as examples of differing rules of law.

in violation of 18 U.S.C. § 1503; and tampering with witnesses, in violation of 18 U.S.C. § 1512, constitute relevant predicate offenses for their civil RICO action. The district court found that Plaintiffs' mail and wire fraud claims failed because Plaintiffs were unable to establish reasonable reliance, which is an essential element of mail and wire fraud predicates in the civil RICO context. *Florida Evergreen Foliage,* 165 F.Supp.2d at 1351-54. The district court further found that Plaintiffs' obstruction of justice and witness intimidation claims failed because they did not satisfy the "direct injury" requirement of RICO claims. *Id.* at 1354-56.

1. Mail and Wire Fraud

To demonstrate a violation of the mail or wire fraud statutes,[15] Plaintiffs must show that DuPont "had a conscious, knowing intent to defraud and that a reasonably prudent person would have been deceived by [its] misrepresentations." *Pelletier v. Zweifel,* 921 F.2d 1465, 1503 (11th Cir.1991) (concluding that a sophisticated plaintiff's claim of reliance failed in light of undisputed facts showing that he "did not trust [the defendant's] representations and did not act as though he trusted [the defendant]"). In other words, to establish a RICO fraud claim Plaintiffs must make the same showing of reasonable reliance that is required for establishing common law fraud. *Pelletier,* 921 F.2d at 1499; *Beck v. Prupis,* 162 F.3d

[15] The substantive elements of mail and wire fraud are identical. *Beck v. Prupis,* 162 F.3d 1090, 1095 (11th Cir.1998) (explaining that civil RICO fraud claims require that plaintiffs "prove that a reasonable person would have relied on the misrepresentations").

1090, 1095 (11th Cir.1998) (stating that a plaintiff must "prove that a reasonable person would have relied on the misrepresentations").

Just as Plaintiffs could not establish justifiable reliance with respect to their state-law fraud claims, they also cannot establish justifiable reliance with respect to their mail and wire fraud claims. The Supreme Court has instructed that "federal courts should incorporate state law as the federal rule of decision, unless application of the particular state law in question would frustrate specific objectives of the federal programs." *Kamen v. Kemper Fi. Servs., Inc.,* 500 U.S. 90, 98, 111 S.Ct. 1711, 1717, 114 L.Ed.2d 152 (1991) (internal quotations omitted).

We conclude that the district court correctly found that the incorporation of *Mergens'* rule that "when negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties" was not inconsistent or incompatible with the policies underlying the RICO statute. *Mergens,* 166 F.3d at 1118 (internal quotation omitted). Therefore, Plaintiffs' predicate mail and wire fraud claims fail.

2. Obstruction of Justice and Witness Tampering

"In addition to proving racketeering activity, a civil RICO plaintiff must show that the racketeering activity caused him to suffer an injury." *Beck,* 162 F.3d at 1095. The federal obstruction and witness intimidation claims are only applicable to federal proceedings. *O'Malley v. New York City Transit Auth.,* 896 F.2d 704, 707 (2d Cir.1990). The only federal case in which Plaintiffs allege any of the

predicate acts took place is the *Bush Ranch* case. Plaintiffs were not parties to the *Bush Ranch* case, but allege that it was one of the cases that their attorneys were monitoring closely. "[A] plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 268-69, 112 S.Ct. 1311, 1318, 117 L.Ed.2d 532 (1992).

In order for a pattern of racketeering activity to be a cognizable cause of civil RICO injury to a private plaintiff, one or more of the predicate acts must not only be the "but for" cause of the injury, but the proximate cause as well. *Holmes,* 503 U.S. at 268, 112 S.Ct. at 1317-18; *Beck,* 162 F.3d at 1095-96. A wrongful act is "a proximate cause if it is a substantial factor in the sequence of responsible causation." *Cox v. Administrator U.S. Steel & Carnegie,* 17 F.3d 1386, 1399 (11th Cir.1994) (internal quotation omitted). Plaintiffs must show a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes,* 503 U.S. at 268, 112 S.Ct. at 1318. This court asks whether the alleged conduct was "aimed primarily" at a third party. *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.,* 140 F.3d 898, 906 (11th Cir.1998) (holding that a party whose alleged injuries result from "'the misfortunes visited upon a third person by the defendant's acts lacks standing to pursue a claim under RICO") (quoting *Holmes,* 503 U.S. at 268, 112 S.Ct. at 1318); *see Maiz v. Virani,* 253 F.3d 641, 657 (11th Cir.2001) (considering whether "the RICO violations alleged in this case were ever aimed 'primarily' at the corporations").

Plaintiffs argue that they were direct targets of DuPont's racketeering and that they suffered direct injury

in that DuPont knew that Plaintiffs were monitoring the *Bush Ranch* case and that DuPont hid and falsified evidence in that case to defeat cases throughout the country. This is too remote to satisfy the proximate cause requirements because the directness inquiry is not a question of specific intent. *See Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters,* 459 U.S. 519, 537, 103 S.Ct. 897, 908, 74 L.Ed.2d 723 (1983); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.,* 191 F.3d 229, 242 (2d Cir.1999) (noting that "an allegation of specific intent does not overcome the requirement that there must be a direct injury to maintain this action;" the contrary view was "specifically rejected" by the Supreme Court); *Pillsbury, Madison & Sutro v. Lerner,* 31 F.3d 924, 929 (9th Cir.1994) ("Pillsbury's contention that its allegations of defendants' specific intent to cause harm to it somehow preserves its standing in this case is incorrect. The existence of specific intent does not answer the question of whether the injury is specifically direct."). "[T]he test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable." *Bivens,* 140 F.3d at 908. The Plaintiffs cannot establish that DuPont's obstruction of justice and witness tampering in the *Bush Ranch* case were the proximate cause of their alleged injury. Therefore, Plaintiffs' obstruction of justice and witness tampering predicate claims fail.

Because Plaintiffs cannot demonstrate justifiable reliance on DuPont's acts of mail and wire fraud or proximate cause between the alleged acts of obstruction of justice and witness tampering and their injuries, they cannot establish any valid predicate acts. Absent any valid predicate

acts, the Plaintiffs have failed to state a valid claim for RICO violations.

*E. Spoliation*

The elements of a spoliation claim are

> (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages.

*Continental Ins. Co. v. Herman,* 576 So.2d 313, 315 (Fla.Dist.Ct.App.1990); *see Hagopian v. Publix Supermarkets, Inc.,* 788 So.2d 1088, 1091 (Fla.Dist.Ct.App.2001). Plaintiffs must "demonstrate that [they] were unable to prove [their] underlying action owing to the unavailability of the evidence." *Herman,* 576 So.2d at 315.

Plaintiffs' spoliation claim rests more on concealment than actual destruction. Plaintiffs argue that concealment of evidence may constitute spoliation; however, no Florida case has ever held that concealment of evidence constitutes spoliation. To the contrary, spoliation is defined as the "destruction" of evidence or the "'significant and meaningful alteration of a document or instrument.'" *Aldrich v. Roche Biomedical Labs., Inc.,* 737 So.2d 1124, 1125 (Fla.Dist.Ct.App.1999) (quoting Black's Law Dictionary 1401 (6th ed.1990)). Concealment does not constitute spoliation because such conduct is covered by the litigation privilege. *See Jost v. Lakeland Regional Med. Ctr.,* 844 So.2d 656, 658 (Fla.Dist.Ct.App.2003) ("Concealment of

evidence, however, does not form a basis for a claim of spoliation."); *see, e.g., Regal Marble, Inc. v. Drexel Investments, Inc.,* 568 So.2d 1281, 1282 (Fla.Dist.Ct.App.1990) (finding no cause of action for the deliberate introduction of alleged false exhibits into evidence in a prior case); *Perl v. Omni Int'l of Miami, Ltd.,* 439 So.2d 316, 317 (Fla.Dist.Ct.App.1983) (finding that litigation immunity barred a damages claim for "fraud, perjury, and forgery" based on "alleged false testimony and alleged false documentary evidence").[16]

Plaintiffs assert that their spoliation claim encompasses DuPont's destruction of test plants involved in a field trial conducted in Costa Rica and the concealment of the analytical testing. However, Plaintiffs do not assert that DuPont destroyed evidence essential to the Plaintiffs' case, such as Plaintiffs' own plants or the allegedly defective Benlate that Plaintiffs claim to have applied to their plants. Plaintiffs merely argue that "[w]ithout the withheld[,] altered, and destroyed evidence, Appellants could

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[16] In *Jost,* a medical malpractice plaintiff amended her complaint to add counts for spoliation, claiming that the defendants "concealed or destroyed evidence" relevant to the malpractice claim. The court affirmed the dismissal of the spoliation claims because concealment does not form a basis for a claim for spoliation. The court also held that a plaintiff cannot bring an independent spoliation claim where the alleged spoliator and the defendant in the underlying action are "one and the same" because remedies exist in the context of the underlying suit. 844 So.2d at 657-58. *See also Martino v. Wal-Mart Stores, Inc.,* 835 So.2d 1251, 1256 (Fla.Dist.Ct.App.2003) (holding that "an independent cause of action for spoliation of evidence is unnecessary and will not lie where the alleged spoliator and the defendant in the underlying litigation are one and the same").

not effectively rebut DuPont's 'better science' evidence." [Appellants' Br. at 36-37].

Plaintiffs' inability to rebut a defense theory is not "significant impairment" of the Plaintiffs' ability to prove its case. Plaintiffs cannot show that the actual destruction of the test plants in Costa Rica led to their inability to prove their lawsuit. Therefore, the district court properly dismissed Plaintiffs' spoliation claim.

*F. Leave to Amend*

Two days prior to the scheduled oral argument on DuPont's motions for judgment on the pleadings on Plaintiffs' RICO and spoliation claims, Plaintiffs filed a motion for leave to amend their complaint. The proposed amendments seek to revise the factual allegations of the amended complaint, delete certain claims upon which the district court had already ruled and which were before this court for review, and add new Florida RICO claims. The proposed amended complaint directly affected the issues already pending before this court on interlocutory appeal.

"The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982); *see Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.,* 906 F.2d 1059, 1063 (5th Cir.1990) ("When one aspect of a case is before the appellate court on interlocutory review, the district court is divested of jurisdiction over that aspect of the case. A district court does not have the power to alter the status of the case as it rests before the Court of Appeals.") (citations

and internal quotation marks omitted). Because the proposed amendment would have altered the status of the case, the district court properly found that it was without jurisdiction to grant Plaintiffs' leave to file an amended complaint.[17]

However, an interlocutory appeal does not completely divest the district court of jurisdiction. "The district court has authority to proceed forward with portions of the case not related to the claims on appeal. . . ." *May v. Sheahan*, 226 F.3d 876, 880 n. 2 (7th Cir.2000). Therefore, the district court did possess jurisdiction to rule upon DuPont's Rule 12(c) motion directed at Plaintiffs' RICO and spoliation claims.

## CONCLUSION

While we do not sanction DuPont's alleged conduct and note that other penalties exist for such dishonest actions, for the reasons outlined in this opinion, we conclude that the district court properly entered judgment on the pleadings and did not abuse its discretion in denying Plaintiffs' motion for leave to amend their complaint when the amendment would have affected the issues already

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[17] Additionally, Plaintiffs' proposed Florida RICO claims were futile, for the same reasons supporting the dismissal of Plaintiffs' federal RICO claims. *See O'Malley v. St. Thomas Univ., Inc.*, 599 So.2d 999, 1000 (Fla.Dist.Ct.App.1992) (relying on federal RICO caselaw in affirming the dismissal of Florida civil RICO claims on the ground that "indirect injury" is not sufficient to confer standing under Florida RICO).

before this court on interlocutory appeal. Accordingly, we affirm the Rule 12(c) judgment on the pleadings.

AFFIRMED.

135 F.Supp.2d 1271

United States District Court, S.D. Florida.

FLORIDA EVERGREEN FOLIAGE and Louis Chang, Plaintiffs,

v.

E.I. Du PONT De NEMOURS AND COMPANY, Defendant.

Steven J. Gutter, et al., Plaintiffs,

v.

E.I. Dupont de Nemours, et al., Defendants.

**Nos. 98-2256-Civ, 98-2242-Civ, 98-2243-Civ, 98-2244-Civ, 98-2245-Civ, 98-2246-Civ, 98-2247-Civ, 98-2248-Civ, 98-2249-Civ, 98-2254-Civ, 99-7042-Civ, 99-7043-Civ, 99-7217-Civ, 99-7228-Civ, 99-7229-Civ, 00-2771-Civ, 00-2772-Civ, 00-2773-Civ, 97-0059-Civ, 99-0336-Civ, 95-2152-Civ.**

March 8, 2001.

Sean L. Moore, Fort Lauderdale, FL, Thomas A. Pendarvis, A. Camden Lewis, Lewis Babcock & Hawkins, Columbia, SC, David W. Moyer, Stephen T. Cox, Cox & Moyer, San Francisco, CA, for Florida Evergreen Foliage, Louis Chang.

Edward A. Moss, Thomas Emerson Scott, Jr., Shook Hardy & Bacon, Miami, FL, William H. Boice, A. Stephens Clay, James F. Bogan, III, Kilpatrick Stockton, Atlanta, GA, Alice Guyton Hector, Lance August Harke, Harke & Clasby, Miami, FL, for E.I. DuPont De Nemours and Company.

## *ORDER ON DUPONT'S MOTIONS FOR JUDGMENT ON THE PLEADINGS*

GOLD, District Judge.

THIS CAUSE is before the Court upon the following motions:

- *DuPont's Motion for Judgment on the Pleadings As to All Damages Claims Based on Litigation Conduct,*[1] filed on September 20, 2000, along with a separate supporting brief. Plaintiffs filed an *Opposition* on October 19, 2000, which also included a *Request for Judicial Notice.* DuPont filed a Reply on November 7, 2000.

- *DuPont's Motion for Judgment on the Pleadings Based on Plaintiff's Inability to Establish Reasonable Reliance as a Matter of Law,* filed on October 10, 2000, along with a supporting brief. Plaintiffs filed a *Memorandum in Opposition to DuPont's Motion for Judgment on the Pleadings* on October 26, 2000, and DuPont filed a *Reply Memorandum* on November 20, 2000.

Oral arguments were held on December 20, 2000, after which the Court requested supplemental memoranda from the parties.[2] Thereafter

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[1] Both motions for judgment on the pleadings were filed as case-specific pleading in Case No. 98-2256-CIV-GOLD. Case No. 98-2256-Civ-Gold is currently one of 34 related pending cases before this Court. DuPont is a defendant in 25 of these cases, including Case No. 98-2256-Civ-Gold, and a plaintiff in nine others. Notwithstanding these differences, all of the cases are essentially the same. The Court has generally referred to the Claimant Growers as "Plaintiffs" and DuPont as "Defendant," and will do so in this Order.

[2] The supplemental memoranda were primarily on the issues of reasonable reliance and a potential common issues trial. This order

(Continued on following page)

supplemental memoranda were filed by all the parties on January 16, 2001, and responses to the supplemental memoranda were filed on February 2, 2001.

DuPont seeks dismissal of this action pursuant to Federal Rule of Civil Procedure 12(c).[3] After careful consideration of the parties' arguments, the applicable case law, and the record as a whole, the Court concludes that both DuPont's Motion for Judgment on the Pleadings As to All Damages Claims Based on Litigation Conduct and DuPont's Motion for Judgment on the Pleadings Based on Plaintiff's Inability to Establish Reasonable Reliance as a Matter of Law should be granted in part and denied in part. Furthermore, as explained in the conclusion of this Order, the Court certifies that an interlocutory appeal by either or both parties is appropriate as to this Order.

## I. Background

The First Amended Complaint [D.E. 2], filed on October 22, 1998, contains thirteen claims for relief, as follows: Count 1, fraud; Count 2, intentional nondisclosure of material facts; Count 3, fraudulent inducement to settle;

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does not address the propriety of a common issues trial or any of the arguments of the parties related thereto.

[3] Federal Rule of Civil Procedure 12(c) states:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Count 4, fraud on the court under Fed.R.Civ.P. 60(b); Count 5, rescission and damages for fraud; Count 6, racketeering in violation of 18 U.S.C. § 1962(c); Count 7, violation of 18 U.S.C. § 1962(d) by conspiracy to violate 18 U.S.C. § 1962(c); Count 8, conspiracy; Count 9, abuse of process; Count 10, infliction of emotional distress; Count 11, interference with prospective economic advantage; Count 12, spoliation of evidence; and Count 13, violation of the Florida Deceptive and Unfair Trade Practices Act. Defendant DuPont filed a Counterclaim and Answer [D.E. 106] on May 24, 2000, and Plaintiffs filed an Answer to DuPont's Counterclaim [D.E. 114] on June 13, 2000. These pleadings were considered for purposes of resolving the pending motions, with all the ambiguities and inferences interpreted in the light most favorable to the Plaintiffs.

In order to understand the history of this case, it is necessary to discuss the underlying lawsuits and related proceedings that led to the present claims and the current disposition of the suit. In September 1992, Green Leaf Nursery, Inc. ("Green Leaf"), a Florida plant nursery, and its owner, Gus Pena ("Pena"), sued DuPont, asserting products liability claims based on property damage due to DuPont's fungicide Benlate and actual fraud claims based on DuPont's alleged concealment of Benlate's defects (the "Underlying Lawsuit"). *See* DuPont's Motion to Dismiss [D.E. 34], Exhibit 1 for a copy of the Complaint in the Underlying Lawsuit. Hundreds of similar Benlate lawsuits were brought by growers against DuPont and others in various parts of the United States. Green Leaf and Pena settled their claims with DuPont and executed a settlement agreement in favor of DuPont on May 25, 1994 (the "Settlement Contract" or "Settlement Agreement").

The settlement agreement states in paragraph 1 that:

> In consideration of Defendant's [DuPont's] payment of the amount set forth in the authorization previously signed by Plaintiff[s] [Green Leaf & Pena], Plaintiff[s] hereby release[ ] Defendant from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Plaintiff[s] ever had, now ha[ve], or may hereafter have against Defendant, by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed (including, but not limited to, the claims asserted and sought to be asserted in the Action).

Settlement Contract § 1. The settlement agreement also contained a choice of law provision in paragraph 15 stating that the release "shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the choice of laws provisions thereof." Settlement Contract § 15. On August 21, 1995, Judge Elliot issued an opinion in a related Benlate action, commonly called the *Bush Ranch* case, finding that DuPont had committed fraud on the court and imposing significant monetary sanctions on DuPont. *See In re E.I. du Pont de Nemours & Co.-Benlate Litigation,* 918 F.Supp. 1524 (M.D.Ga.1995), *rev'd,* 99 F.3d 363 (11th Cir.1996). On August 29, 1995, Plaintiffs dismissed the Underlying Lawsuit with prejudice pursuant to the May 25, 1994 Settlement.

The Amended Complaint to the action pending before this Court alleges that during the course of the litigation of the Underlying Lawsuit, DuPont wrongfully, illegally, and fraudulently withheld from discovery vital scientific data and information that DuPont was under an obligation to produce in the Underlying Suit and in other Benlate litigation being conducted simultaneously in other courts. Plaintiffs also

allege that DuPont gave false testimony in other Benlate cases about Benlate's alleged defects and about scientific tests of Benlate relating to such issues. Plaintiffs further allege that the data was material to establishing the allegedly defective and contaminated nature of Benlate. They claim that DuPont withheld this data and information and made false statements in implementation of a scheme to defraud Plaintiffs and others who had used Benlate and suffered resulting damage. Plaintiffs state that the fraudulent conduct began before September 1991 and continued through the filing of the present action in 1998. Plaintiffs were monitoring the Benlate litigation in other courts, and the effect of DuPont's scheme and fraud was to induce Plaintiffs to enter into the May 1994 settlement agreement with DuPont in this case for less money than they would have otherwise insisted upon and been able to obtain.

Prior to the filing of Case No. 98-2256-Civ-Gold, seven similar lawsuits were filed by commercial nurseries against DuPont and consolidated in front of Judge Lenard. *See* Case No. 97-0059-Civ-Gold (formerly 97-0059-Civ- Lenard).[4] Judge Lenard dismissed the cases under Fed.R.Civ.P. 12(b)(6) on the ground that the releases in the settlement agreements barred the fraudulent inducement claims. Because the choice-of-law provision in the settlement releases presented novel issues of Florida law, the Eleventh Circuit certified two questions to the Supreme Court of Florida. In response, the Supreme Court of Florida, on June 8, 2000, held that the choice-of-law provision in the settlement agreement controls

[4] Upon remand, the cases that had been originally assigned to Judge Lenard were transferred to this Court in the interests of judicial economy due to the relatively advanced stage of these proceedings.

the disposition of the claim that the agreement was fraudulently procured where the defrauded party has elected to affirm the contract and sue for damages, and that where Florida law applies, the release in these settlement agreements does not bar plaintiffs' fraudulent inducement claims. *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.,* 761 So.2d 306, 313 & 316 (Fla.2000). The Eleventh Circuit therefore reversed Judge Lenard's ruling and remanded the cases, but expressly stated that the district court should consider DuPont's arguments with regard to justifiable reliance upon remand. *See Mazzoni Farms, Inc. v. E.I. Dupont De Nemours and Co.,* 223 F.3d 1275, 1276 n. 2 (11th Cir.2000).

Meanwhile, upon a motion to dismiss in the consolidated cases before this Court, the question of whether the release in the settlement agreements bars plaintiffs' fraudulent inducement claims was certified to and accepted by the Supreme Court of Delaware. In an opinion issued on December 6, 1999, the Supreme Court of Delaware held that, under Delaware law, a tort claimant fraudulently induced to execute a release may opt either for rescission or a separate suit for fraud with damages calculated on the difference between that received under the release and the value of the settlement or recovery achieved had there been no fraud by the released party. *See E.I. DuPont De Nemours & Co. v. Florida Evergreen Foliage,* 744 A.2d 457, 458 (Del.1999).

## II. Standard of Review

Judgment on the pleadings is appropriate where no issue of material fact remains unresolved and the moving party is entitled to judgment as a matter of law. *See Ortega v.*

*Christian,* 85 F.3d 1521, 1524 (11th Cir.1996). When reviewing judgment on the pleadings, the court must take the facts alleged in the complaint as true and view them in the light most favorable to the nonmoving party. *Id.* at 1524. A complaint may not be dismissed on a motion for judgment on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hawthorne v. Mac Adjustment, Inc.,* 140 F.3d 1367, 1370 (11th Cir.1998). The pleadings considered by the court on a motion for judgment on the pleadings include the complaint, answers, counterclaim, and crossclaim, if any. *See Santmyer v. Prudential Ins. Co. of Am.,* 761 F.Supp. 114, 117 (M.D.Fla.1991).

## III. Discussion

### A. Which state law to apply?[5]

In the pleadings based on these motions, as well as other pleadings before this Court,[6] the parties have devoted

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[5] As noted in the background statement, the settlement agreement at issue in Case No. 98-2256-Civ-Gold contains a choice of law provision stating that the release "shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the choice of laws provisions thereof." Settlement Contract § 15. Not all of the settlement agreements in the related Benlate settlement fraud cases that are consolidated before this Court contain this choice of law provision. Where they do not, it is axiomatic that Florida law applies to the parties' substantive claims. *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.,* 761 So.2d 306 (Fla.2000). For the agreements containing a Delaware choice of law provision, the analysis of which state's substantive to apply parallels the analysis set forth in this section.

[6] See, e.g., *DuPont's Motion for Consolidation of Cases for a "Common Issues" Trial,* filed on October 10, 2000, and pleadings

(Continued on following page)

considerable attention to whether Delaware or Florida substantive law should apply to Plaintiffs' state law tort claims. DuPont has advocated in favor of Florida law, whereas Plaintiffs maintain that Delaware law should be applied, despite the fact that the Amended Complaint states that it "alleges common law claims under the laws of the State of Florida." Amended Complaint § 12. Upon a thorough review of the parties' arguments, the applicable case law, and the facts of this case, the Court concludes that DuPont has correctly stated that Florida law should be applied to Plaintiffs' tort claims.

In order to determine whether the choice of law provision in the settlement release agreement should be given effect, the court must look to the choice of law rules of the forum state, Florida. *See Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). The parties agreement as to which law governs the construction of the contract is recognized under Florida law, unless the chosen law contravenes Florida public policy. *Coral Gables Imported Motorcars, Inc. v. Fiat Motors of North Amer., Inc.,* 673 F.2d 1234, 1238 (11th Cir.1982). The Florida Supreme Court has already decided in this case on the certified question from the Eleventh Circuit that the choice of law provision controls and that Delaware law should be applied to determine whether the release bars a fraudulent inducement claim. *Mazzoni Farms, Inc. v. E.I. DuPont,* 761 So.2d 306 (Fla.2000). The Supreme Court of Delaware in turn

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relating to this motion. The Court considered the arguments made in these related pleadings in deciding the choice of law issue.

has held that the release in question does not block plaintiff's fraudulent inducement claim. *E.I. Du Pont v. Florida Evergreen Foliage,* 744 A.2d 457 (Del.1999).

However, the decisions by the Supreme Court of Florida and Supreme Court of Delaware were limited to interpreting the construction and effect of the release and choice of law language. Neither opinion focused upon what substantive law should be applied to the plaintiffs' tort claims, assuming they Were permitted to go forward. As Justice Hoeveler noted in 1992, even when a contract has a clause saying it shall be construed under and in accordance with the laws of a particular state, "[c]laims arising in tort are not ordinarily controlled by a contractual choice of law provision . . . . Rather, they are decided according to the law of the forum state." *Burger King Corp. v. Austin,* 805 F.Supp. 1007, 1012 (S.D.Fla.1992) (quoting *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.,* 971 F.2d 401, 407 (9th Cir.1992)). Florida utilizes the most significant relationship test to determine which state's law applies to tort claims. *Garcia v. Public Health Trust,* 841 F.2d 1062, 1064-65 (11th Cir.1988). In this case, all of the Claimant Plaintiffs are Florida corporations or individual citizens, the original state lawsuits in which Plaintiffs allege they were fraudulently induced to settle were brought in Florida, and the cases were settled in Florida. Florida therefore has the most significant relationship to the claims, and it is appropriate for the court to apply Florida law to the tort claims. Furthermore, the language in the release, upon a plain reading by the Court, is not broad enough to encompass tort claims. *See Sunbelt Veterinary Supply, Inc. v. International Business Systems,* 985 F.Supp. 1352, 1356 (M.D.Ala.1997). The language of the agreement states "This Release shall be governed and

construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of law provisions thereof." The choice of law provision does not state that any and all claims arising out of the relationship of the parties shall be governed by Delaware law, or anything to that effect. The tort claims shall therefore be interpreted under Florida law.

### B. Litigation Conduct

DuPont argues that it is entitled to judgment on the pleadings as to all claims for damages asserted in the October 22, 1998 First Amended Complaint that are based on allegations of conduct alleged by the Plaintiffs to have taken place during the course of and related to any prior lawsuit. DuPont also asserts that it is entitled to judgment on the pleadings with respect to Count IV ("Fraud on the Court" and "Independent Action Recognized In FRCP Rule 60(b)") insofar as that count purports to assert any claim for damages. The bases for DuPont's motion are that (a) as a matter of Florida and Federal law, absolute immunity is afforded to litigation conduct in any subsequent civil action for damages, and (b) damages cannot be recovered under any "independent action" preserved by Fed.R.Civ.P. 60 or for "fraud on the court."

"Litigation conduct," as used in DuPont's motion for judgment on the pleadings as to all damages claims based on litigation conduct, refers to Plaintiff's allegations that in prior litigation DuPont failed to respond or issued improper responses to discovery, gave untruthful testimony, submitted improper or obstructive motions, committed misconduct during the litigation or trial of a case, disobeyed orders or stipulations entered in a lawsuit, and

took false litigation positions. DuPont did not address Plaintiffs' allegations of spoliation of evidence and witness intimidation, or any other conduct that might be encompassed by Plaintiffs' general, non-particularized allegations, if they occurred apart from and unrelated to any prior lawsuit.

### 1. Florida Law: Counts One, Two, Three, Five, Eight, Nine, Ten, Eleven, & Thirteen

The principle case relied on by DuPont to support its argument that the state law damage claims are barred by absolute immunity for litigation conduct is *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.,* 639 So.2d 606 (Fla.1994).

*Levin* was before the Supreme Court of Florida after the Eleventh Circuit Court of Appeals found that it was unclear whether Florida courts would extend the "litigation privilege" to actions based on tortious interference with a business relationship and certified the following question to the Supreme Court of Florida: "Whether certifying to a trial court an intent to call opposing counsel as a witness at trial in order to obtain counsel's disqualification, and later failing to subpoena and call counsel as a witness at trial, is an action that is absolutely immune from a claim of tortious interference with a business relationship by virtue of Florida's litigation privilege." The *Levin* case arose out of a personal injury action in which the defendant's insurance company failed to settle the action and a judgment beyond the primary policy limit was ultimately awarded to the plaintiff. Thereafter, the defendant's secondary insurer retained the Levin firm to bring a bad faith action against the primary insurance company

for failure to settle the personal injury suit within the policy limits. The Levin firm had also represented the plaintiff in the underlying personal injury case. The defendant in the bad faith action listed a Levin attorney as a person who had knowledge of the alleged bad faith, and certified to the trial court that it would be calling the attorney as a witness at trial. As a result, the trial judge disqualified the Levin firm. However, the defendant never subpoenaed the Levin attorney, never called him as a witness, and never notified the court that it would not be calling him as a witness. At trial, the plaintiff won a significant monetary award.

The *Levin* Court answered the certified question in the affirmative. In analyzing the issue, the Court noted that, traditionally, defamatory statements made in the course of judicial proceedings, no matter how false or malicious, are absolutely privileged. *Levin,* 639 So.2d at 607. This results from a balancing between the right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public to a free and full disclosure of the facts in the conduct of judicial proceedings, and the general finding that fear of chilling the actions of participants in judicial proceedings and hampering the adversary system outweighs the inability of some genuinely injured parties to seek relief. *Id.* at 608. The *Levin* Court found it appropriate to extend this reasoning to any act related to a judicial proceeding, stating:

> In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior

> such as the alleged misconduct at issue [i.e., improperly listing a witness so as to disqualify the opposing party's attorney], so long as the act has some relation to the proceeding. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

*Levin,* 639 So.2d at 608. The *Levin* Court went on to state that the decision to grant absolute immunity does not mean that a remedy for a participant's misconduct is unavailable, as "a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct business in a proper manner, and to protect the court from acts obstructing the administration of justice." *Id.* at 608-09. Accordingly, DuPont argues that the proper remedy for improper litigation conduct related to another case is a contempt motion before the trial court, not a separate tort action, and that Florida's absolute immunity for litigation conduct bars all of Plaintiffs' common law state damages claims. This Court agrees.

The bulk of Plaintiffs' opposition to DuPont's motion for judgment on the pleadings as to all damages claims based on litigation conduct argues that Delaware law applies to Plaintiffs' tort claims for fraudulent inducement and that under Delaware law, DuPont is not immune from civil liability. As noted above, Florida law applies to Plaintiffs' tort claims, not Delaware law. Therefore, these

arguments are unavailing. Under Florida law, Plaintiffs make the following three arguments against DuPont's claim of immunity: (1) the Supreme Court of Florida's decision in *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So.2d 306 (Fla.2000), demonstrates that Florida law allows a fraudulent inducement claim based on litigation conduct; (2) even if Florida law applies and the Court finds that *Mazzoni* does not authorize the lawsuit, the *Levin* case is distinguishable, and the argued-for immunity should be interpreted as only a qualified immunity; and (3) DuPont's argument for immunity is inconsistent with Florida law related to spoliation of evidence. These arguments fail to refute the Defendant's arguments that Florida's rule of absolute immunity for litigation conduct bars Plaintiffs' damages claims.

First, Plaintiffs argue that the Supreme Court of Florida's *Mazzoni* decision demonstrates that Florida law permits a fraudulent inducement claim based on litigation misconduct. However, contrary to Plaintiffs' contentions, that was not the holding of the Supreme Court. Based on a certified question from the Eleventh Circuit Court of Appeals, the Supreme Court of Florida specifically held that: (a) where, as here, the defrauded party elects to affirm the contract and sue for damages, the choice-of-law provision in the settlement agreement shall be enforced (*see Mazzoni,* 761 So.2d at 313); and (b) in those cases in which the settlement agreements do not contain a choice-of-law provision, Florida law controls, and the release language is too narrow to bar fraudulent inducement claims (*see Mazzoni,* 761 So.2d at 316). The Supreme Court of Florida did not examine the possibility of immunity for litigation conduct, and to say that they impliedly

denied the possibility of immunity in these cases is to read too much into the *Mazzoni* opinion.

Second, Plaintiffs argue that *Levin* is distinguishable and that any immunity owed to DuPont is only a qualified immunity, and is therefore overcome by Plaintiffs' allegations. Specifically, Plaintiffs argue that *Levin* is distinguishable because the alleged tortfeasor's actions in that case were within the applicable rules of procedure, whereas the illegal conduct alleged in the Amended Complaint in this case is not within the rules of procedure. Such a distinguishing characteristic is illusory and has not been recognized in any Florida decisions before or after *Levin.* It can arguably be said that all litigation conduct, whether through damaging statements or acts, violates the rules of procedure, including the Florida equivalent of Rule 11, yet the absolute litigation immunity is consistently applied by Florida courts when the statements or actions are related to judicial proceedings. *See, e.g., Rushing v. Bosse,* 652 So.2d 869, 876 (Fla. 4th DCA 1995) (stating that absolute immunity would be awarded for conduct involving a violation of Florida Rule of Judicial Administration 2.060(d) (the equivalent of Fed.R.Civ.P. 11 because such conduct is related to the judicial proceedings)); *Donner v. Appalachian Ins. Co.,* 580 So.2d 797, 798 (Fla. 3rd DCA 1991) (finding that alleged fraudulent misrepresentations made during discovery in a previous action are entitled to absolute immunity).

Next, Plaintiffs argue, based on *Fridovich v. Fridovich,* 598 So.2d 65 (Fla.1992), that any immunity granted to DuPont's actions should be a qualified immunity, subject to being overcome by a showing that the actions or statements were done or uttered with common law express malice. According to Plaintiffs, *Fridovich* should be read to

grant only a qualified immunity where the facts of the case are particularly egregious, as they were in *Fridovich.*

In *Fridovich,* the plaintiff brought suit against his brother, alleging defamation, intentional infliction of mental distress, and malicious prosecution arising out of a conspiracy amongst the plaintiff's family members to have him falsely arrested, indicted, convicted, and sentenced for the murder of his father. Apparently, the plaintiff had shot and killed his father, after which law enforcement officials conducted an investigation and concluded that the shooting was accidental. *Fridovich,* 598 So.2d at 66. No charges were filed and the investigation was closed. Thereafter, after becoming dissatisfied with plaintiff's handling of the estate, a group of family members, including plaintiff's brother, made false statements to police investigators and prosecutors to encourage them to reopen the case. *Id.* As a result, the case was reopened, plaintiff was indicted for first-degree murder, and a jury found him guilty of manslaughter. After trial, two of the conspirators recanted and admitted that their in-court testimony was false. The conviction was reversed on other grounds, plaintiff was tried again, and he was again convicted of manslaughter. *Id.*

The *Fridovich* Court held that the conspirators' defamatory statements made to the authorities were only entitled to a qualified immunity, which was sufficiently overcome by the egregious facts of the *Fridovich* case. *Fridovich,* 598 So.2d at 68-69. However, contrary to Plaintiff's contentions, *Fridovich* does not stand for the general proposition that egregious facts warrant only qualified immunity instead of absolute immunity. The Supreme Court of Florida specifically framed the "primary

question" in *Fridovich* to be "whether defamatory statements made to the authorities *prior* to the initiation of criminal proceedings are absolutely privileged as within the course of judicial proceedings." *Id.* at 66 (emphasis in original). As this quote demonstrates, the crux of the case hinged on the timing of the defamatory statements, coming as they did during the reporting of events concerning a crime, prior to the institution of criminal charges. *Fridovich* is therefore distinguishable from the case currently before the Court, and Plaintiffs' argument that the Court should only apply a qualified immunity standard to DuPont's actions is unconvincing.

Third, Plaintiffs argue that DuPont's assertion that it is entitled to absolute immunity for litigation conduct is inconsistent with Florida law related to spoliation of evidence. Count Twelve of the Amended Complaint seeks damages for spoliation of evidence.[7] DuPont's motion for judgment on the pleadings specifically excluded the spoliation claim under Count Twelve, and DuPont made no arguments in its motion with respect to this cause of action. It is therefore unnecessary and inappropriate for the Court to address Plaintiffs' arguments with respect to spoliation of evidence at this time, and they are deemed to be irrelevant for purposes of deciding this motion.

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[7] The elements of a spoliation of evidence claim are: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages. *Continental Ins. Co. v. Herman,* 576 So.2d 313, 315 (Fla. 3rd DCA 1990).

Finally, Plaintiffs submitted a notice of supplemental authority on December 12, 2000 that they claim supports their arguments against enforcement of absolute immunity for litigation conduct in this case. The notice highlights an August 7, 2000 Order Denying Defendant, E.I. DuPont de Nemours and Company's, Motion to Dismiss and Amended Motion to Dismiss Second Amended Complaint issued by the Circuit Court for the Eighth Judicial Circuit in and for Alachua County, Florida, Division J, in *Gilley v. Friedman, Rodriguez, Ferraro & St. Louis, P.A.*, Case No. 98-2781-CA (attached as Exhibit F to Plaintiffs' Notice of Supplemental Authority). The Notice also includes a copy of Gilleys' Supplemental Motion for Leave to Assert Claim for Punitive Damages (Exh.A), DuPont's Amended Motion to Dismiss Plaintiffs' Second Amended Complaint (Exh.B), Plaintiffs' Brief in Opposition to Defendants' Supplemental Motions to Dismiss (Exh.C), Plaintiffs' letter to Judge Chance post-hearing and proposed judgment (Exh.D), and DuPont's response memorandum to Plaintiffs' letter brief Judge Chance dated July 27, 2000 (Exh.E).

In *Gilley,* Plaintiff Jerry Gilley and Doris Gilley d/b/a Gilley Farms and Jeffrey Wagner and Susan Wagner d/b/a Florida Regional Landscape Nursery sued the law firm of Friedman, Rodriguez, Ferraro & St. Louis, P.A., shareholders in Friedman, Rodriguez, and DuPont for claims of breach of fiduciary duty, fraud and conspiracy to commit actual fraud, conversion, recovery of secret profits, and intentional interference with contract. The plaintiffs had hired Friedman, Rodriguez in 1995 to pursue claims against DuPont for damages to their farming operations related to the use of Benlate on their crops. According to the plaintiffs, in August, 1996, the law firm defendants

accepted a secret bribe from DuPont in connection with the settlement of the plaintiffs' claims.

DuPont's motion to dismiss the amended complaint in *Gilley* argues that all the claims against DuPont, which are based on DuPont's alleged misconduct in settling the Plaintiffs' claims in the underlying actions, must be dismissed because: (1) DuPont's actions are absolutely protected by Florida's litigation privilege; (2) the Plaintiffs have waived their claims against DuPont; (3) Plaintiffs fail to otherwise state a cause of action against DuPont in each of Counts III through VI; and (4) Plaintiffs fail to satisfy the pleading requirements for class representation.

The Order issued by the state court (Exh.F) summarily denies DuPont's motion without any analysis or statement of reasons. As such, this Court is unable to ascertain the circuit court's reasoning or to grant the order any persuasive authority. Simply because DuPont raised the issue of litigation privilege in a motion that was summarily denied in a different case involving a distinctly different factual scenario than the case before this Court is not sufficient to persuade this Court that the absolute immunity for litigation conduct recognized by the Florida Supreme Court in *Levin* does not apply here.

Plaintiffs have not disputed that the misconduct allegedly committed by DuPont that forms the basis for the majority of the claims in this lawsuit bears some relation to other judicial proceedings that were going on concurrently to the underlying lawsuit. The misconduct is alleged to include the following actions:

(1) Falsification and concealment of the Alta Labs[8] data. The Plaintiffs allege that DuPont refused to produce the results and raw data when ordered to do so by the *Bush Ranch* trial court. Complaint §§ 72-88. DuPont allegedly prepared a false summary of the Alta Labs data, which it presented at trial through its expert at the *Bush Ranch* trial, who also testified falsely in court. Amended Complaint §§ 84-90. DuPont's attorneys are also alleged to have made false statements to the court in the *Billy Lambert v. DuPont* case regarding Alta Labs test results, and to have failed to correct those false statements. Amended Complaint §§ 100-104. Furthermore, DuPont is alleged to have fraudulently concealed Alta Labs test results to the court in the Hawaii Benlate litigation by presenting false testimony and falsely asserting the work-product privilege. Amended Complaint §§ 107-113, 129-134.

(2) Concealment of the Costa Rica field tests. Plaintiffs allege that DuPont conducted field tests in Costa Rica in 1992 that showed that Benlate was defective. Amended Complaint § 191. DuPont then destroyed the results and denied the existence of the field tests in discovery responses and in the courtroom. *Id.* at §§ 191-227. The existence of this scheme was uncovered in the *Davis Tree Farms, Inc. v. DuPont* case.

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[8] Alta Labs of California was one of the few laboratories in the country capable of performing the sophisticated soil and water analysis necessary to detect trace amounts of SU contamination in the soil and water of the plaintiffs' farms. DuPont took soil and water samples from the plaintiffs' farms and sent them to Alta in July, 1993, in preparation for the *Bush Ranch v. Dupont* trial. Amended Complaint § 65-67.

This Court finds that the acts allegedly committed by DuPont, although perhaps egregious and damaging to Plaintiffs, are definitely related to other judicial proceedings and that DuPont is therefore immune from civil liability for its actions. As noted in *Levin,* this does not mean that DuPont is immune from punishment: it may be held in contempt by the courts that it allegedly defrauded, it may be prosecuted by the state for criminal violations, and its attorney's may be disciplined by the bar for their alleged ethical violations. *See Levin,* 639 So.2d at 608. In fact, as demonstrated by the orders attached to the Plaintiffs' Request for Judicial Notice, DuPont has already been subject to reprimands and monetary sanctions for its actions by some of the courts in which it is alleged to have committed its tortious behavior. *See* August 21, 1995 Opinion and Order in *Bush Ranch v. DuPont,* No. 4:95-CV-36 (JRE) (M.D.Ga.) [Request for Judicial Notice Exh.F]; August 5, 1996 Order in *Davis Tree Farms, Inc. v. DuPont,* Case No. 92-2006 (CA 23) (Fla.11th Cir. Ct.).

Accordingly, the Court finds that all of Plaintiffs' state law damages claims, to the extent those claims are based on litigation conduct, should be dismissed. This includes Counts One, Two, Three, Five, Eight, Nine, Ten, Eleven, and Thirteen.

### 2. Federal Law: Counts Six and Seven (Civil RICO claims)

Plaintiffs seek relief in Counts Six and Seven for alleged violations of the civil RICO act, 18 U.S.C. § 1962(c)

and (d).[9] Plaintiffs allege that mail fraud, in violation of 18 U.S.C. § 1341, wire fraud, in violation of 18 U.S.C. § 1343, obstruction of justice, in violation of 18 U.S.C. § 1503, and tampering with witnesses, in violation of 18 U.S.C. § 1512, constitute the relevant "predicate offenses" for a civil RICO action. The Amended Complaint alleges that DuPont formed an enterprise with others for the purpose of defrauding the Benlate claimants, including the above named Plaintiffs, in order to diminish the value of the Benlate claimants' claims. The offending conduct is alleged to include intentional concealment of the Alta Labs documents and data, the BAM and BPM documents (concerning Benlate testing by other labs – *see* Amended Complaint §§ 146-190), the test results identifying contamination in the Bartlo lots, and the Costa Rica testing information, misleading and fraudulent answers to discovery requests, false and deceptive responses to court orders to produce, and false deposition testimony and statements by DuPont's attorneys to the courts in *Bush Ranch v. DuPont,* No. 92-33-COL, United States District for the Middle District of Georgia, *Kawamata v. United Agri Products,* Circuit Court of the Third Circuit, State of Hawaii, *Tomono v. DuPont,* Civ. No. 92-247K, Circuit Court of the

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[9] In relevant part, 18 U.S.C. § 1962 provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Third Circuit, State of Hawaii, *Billy Lambert v. DuPont,* Florida Circuit Court, *Ritter-Whitworth v. DuPont,* Florida Circuit Court, *Smith v. DuPont,* Florida Circuit Court, and *Davis Tree Farms, Inc. v. DuPont,* Florida Circuit Court, as well as intimidating and impeding witnesses in the *Bush Ranch v. DuPont, Native Hammock, Inc. v. Dupont* and *Asia Pacific v. DuPont* cases.

The provisions of 18 U.S.C. § 1961, *et seq.* (the RICO Act) provide civil and criminal liability for persons engaged in "a pattern of racketeering activity." *See* 18 U.S.C. § 1962(a-d). Persons injured by reasons of a RICO violation have a civil cause of action under the terms of the act. *See* 18 U.S.C. § 1964. The four elements of civil RICO liability are (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Durham v. Business Management Assocs.,* 847 F.2d 1505, 1511 (11th Cir.1988) (internal quotation marks omitted). Plaintiffs in such an action must identify and prove a pattern of racketeering activity, defined as two "predicate acts" of racketeering activity within a 10 year period. *See* 18 U.S.C. § 1961(5). The phrase "racketeering activity" is defined as including any act which is indictable under a lengthy list of criminal offenses, including the federal statutes prohibiting mail and wire fraud, obstruction of justice, and tampering with witnesses. *See* 18 U.S.C. § 1961(1).

Defendant DuPont has attacked Plaintiffs' RICO claims by arguing that the Amended Complaint does not set forth valid and actionable predicate racketeering acts. DuPont argues that the allegations of litigation misconduct do not support the federal civil RICO claims set forth as Counts Six and Seven of the Amended Complaint because federal courts recognize immunity for prior litigation conduct in the RICO context and because the

RICO statute does not abrogate common law privileges. Plaintiffs argue in response that numerous federal courts have in fact upheld civil RICO claims based on litigation related misconduct, and that the cases relied on by Du-Pont are distinguishable.

Plaintiffs' arguments with respect to the civil RICO claims are persuasive. Defendants have not been able to direct the Court to any federal cases specifically holding that litigation conduct by a litigating party in a prior case is entitled to absolute immunity and may not form the basis of a subsequent federal civil RICO claim, and the Court is unaware of any cases that make such a finding. The Court is persuaded by the language of the Seventh Circuit discussing the use of perjury in a prior lawsuit as a possible predicate racketeering act:

> If [the plaintiff] can show that the defendants' lies constituted mail or wire fraud, 18 U.S.C. §§ 1341 and 1343, or an obstruction of justice, 18 U.S.C. § 1503, then those cover-up acts theoretically may serve as predicate acts. *See C & W Constr. Co. v. Brotherhood of Carpenters and Joiners, Local 745,* 687 F.Supp. 1453, 1467 (D.Haw.1988) ("The more reasoned rule would allow perjury to be a predicate act under 18 U.S.C. § 1962(1), through 18 U.S.C. § 1503, where the plaintiffs allege that the perjury was part of the pattern of racketeering."); *see also South Chicago Bank v. Notaro,* 1991 WL 21185, 1991 U.S. Dist. Lexis 1602 (N.D.Ill. Feb.12, 1991) (mailing false financial statements during litigation might be considered predicate acts if mailings proximate cause of RICO injury); *Levit v. Brodner,* 75 B.R. 281, 285 (N.D.Ill.1987) (perjury and destruction of evidence in bankruptcy action might serve as predicate act in subsequent RICO suit).

*Midwest Grinding Co., Inc. v. Spitz,* 976 F.2d 1016, 1021-22 (7th Cir.1992).[10] This passage indicates that litigation conduct, to the extent it constitutes a prohibited action set forth in 18 U.S.C. § 1961(1), may form the basis for predicate racketeering acts and is not afforded the absolute immunity in federal courts that Florida courts afford to such conduct.[11] Additional support is provided by the holdings of other federal courts that the filing of vexatious lawsuits to extort money or property may constitute the requisite predicate racketeering acts. *See Lemelson v. Wang Laboratories, Inc.,* 874 F.Supp. 430, 434-35 (D.Mass.1994); *Hall American Center Associates v. Dick,* 726 F.Supp. 1083, 1097 (E.D.Mich.1989).

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[10] DuPont argues that the Court's statements in *Midwest Grinding* are inapplicable because perjury is not listed as a predicate act in § 1961, an indication that litigation conduct was intended by Congress not to serve as the basis of a federal RICO claim. DuPont has not set forth any precedent to support this assertion, and to the extent this argument directly contradicts the quoted language set forth above, this Court rejects it. Furthermore, DuPont argues that *Midwest Grinding* is also distinguishable and/or inapplicable because almost all of Plaintiff's obstruction allegations concern proceedings in state courts that cannot constitute federal obstruction. To be sure, several federal courts have held that 18 U.S.C. §§ 1503 and 1512 do not apply to state court proceedings. *See O'Malley v. New York City Transit Auth.,* 896 F.2d 704, 707 (2nd Cir.1990); *Park South Assoc. v. Fischbein,* 626 F.Supp. 1108, 1113 (S.D.N.Y.1986). However, Plaintiffs' have alleged that several of the acts of obstruction of justice and witness intimidation occurred in relation to *Bush Ranch v. DuPont,* a federal case.

[11] As noted by the Eleventh Circuit Court of Appeals when analyzing a defendant's duty to disclose under the federal mail and wire fraud statutes in *Langford v. Rite Aid of Alabama, Inc.,* 231 F.3d 1308 (11th Cir.2000), an analysis of state law alone, without consideration of federal law, is incomplete.

DuPont argues that the federal courts recognize broad immunity of parties and witnesses from subsequent damages liability for their testimony and actions in judicial proceedings, and that this immunity should be applied in the RICO setting. However, the majority of cases relied on by DuPont arise in the context of 42 U.S.C. § 1983 actions,[12] and are therefore distinguishable. The immunity principles these cases set forth are based in a different statutory context and were formulated to shield parties from different types of liability. Even accepting the fact that general common law principles provide absolute immunity to witnesses and lawyers for defamatory or false statements made in litigation, this does not necessarily shield DuPont from liability for its fraudulent acts, such as concealing and altering data and defying judicial orders to turn over information, and does not affect the witness tampering and obstruction of justice allegations, which must be expected to "relate to" a judicial proceeding.

### 3. Bringing an independent action under Rule 60(b): Count Four

The Fourth claim for relief in the Amended Complaint is labeled as a claim for "Fraud on the Court" and "Independent Action Recognized in FRCP Rule 60(b)." Plaintiffs

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[12] *See Briscoe v. LaHue,* 460 U.S. 325, 330, 103 S.Ct. 1108, 1113, 75 L.Ed.2d 96 (1983); *Charles v. Wade,* 665 F.2d 661, 666-67 (5th Cir.1982); *Collins v. Walden,* 613 F.Supp. 1306, 1314-15 (N.D.Ga.1985); *Burns v. Reed,* 500 U.S. 478, 489-90, 111 S.Ct. 1934, 1941, 114 L.Ed.2d 547 (1991); *Kahn v. Burman,* 673 F.Supp. 210, 212 (E.D.Mich.1987); *Jones v. Cannon,* 174 F.3d 1271, 1288-89 (11th Cir.1999); *Mastroianni v. Bowers,* 173 F.3d 1363, 1367 (11th Cir.1999); *Franklin v. Terr,* 201 F.3d 1098, 1101-02 (9th Cir.2000).

allege that DuPont's actions constitute a scheme to defraud not only the Plaintiffs, but also the United States District Court and the state courts of Florida and Hawaii. As relief, Plaintiffs ask that they be relieved from the settlements in the underlying matters, and that they be awarded the difference between the settlements received and the settlement values had there been no fraud upon the Court, that sanctions be imposed, and that they receive attorney's fees and punitive damages.

Federal Rule of Civil Procedure 60, entitled "Relief From Judgment or Order," states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

Fed.R.Civ.P. 60(b). The last sentence, termed the "savings clause" of Rule 60(b), provides the basis for Plaintiffs' claim for relief. The savings clause has three

components and authorizes three types of actions: an "independent action" to be relieved of an order, an action for relief to a defendant who did not receive notification, and an action to set aside a judgment for fraud upon the court. Due to the universal interest in the finality of judgments, resort to an independent action is only permitted under unusual and exceptional circumstances. *In re Hillsborough Holdings Corp. (Walter v. Celotex Corp.),* 203 B.R. 1000, 1006 (Bankr.M.D.Fla.1996) (citing *Mallory v. Eyrich,* 922 F.2d 1273, 1281 (6th Cir.1991)). The Eleventh Circuit has held that the elements of an independent action under the savings clause of Rule 60(b) are:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any adequate remedy at law.

*Securities & Exchange Commission v. ESM Group, Inc.,* 835 F.2d 270, 273 (11th Cir.1988) (citing *Bankers Mortgage Co. v. United States,* 423 F.2d 73, 79 (5th Cir.), *cert. denied,* 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 793 (1970)). Plaintiffs in this case have alleged in the Amended Complaint and asserted in their pleadings that their action is for fraud on the court, not an "independent action" as defined above. Fraud on the court is defined as:

> embracing only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that

> are presented for adjudication, and relief should be denied in the absence of such conduct.

*ESM Group, Inc.*, 835 F.2d at 273 (citing *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir.1985) (per curiam)). Whereas fraud between the parties must be brought to the court's attention within one year after judgment is entered, fraud that prevents the functioning of the judicial process does not have to [sic] be brought within any specific period of time. *ESM Group, Inc.*, 835 F.2d at 273.

DuPont concedes in its pleadings that a party to a federal judgment can seek relief from that judgement under Fed.R.Civ.P. 60, that a federal court retains inherent authority to set aside a federal judgment for "fraud on the court," and that sanctions and other criminal penalties can be imposed for criminal contempt and other litigation-related crimes. The crux of DuPont's argument is that compensatory relief is not available under Federal Rule 60.

Plaintiffs rely primarily on *Hazel-Atlas Glass Co. v, Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) as support for Count IV. In *Hazel-Atlas,* the defendant and its attorneys had written an article extolling the virtues of a patented process for glass pouring and had convinced an industry expert to sign the article as the author. The attorneys then relied on the article as authority in their arguments to the Third Circuit in a patent infringement action. *Hazel-Atlas,* 322 U.S. at 240-41, 64 S.Ct. at 998-99. The Supreme Court found that the deliberately planned and carefully executed fraud amounted to a "wrong against the institutions set up to protect and safeguard the public." *Id.* at 246, 64 S.Ct. at 1001. Despite the fact that the prior circuit court decision had been

rendered nine years before the present suit, the Supreme Court held that the Third Circuit had the power and authority to vacate its prior judgment and give the district court appropriate directions. *Id.* at 250, 64 S.Ct. at 1003.

While *Hazel-Atlas* supports Plaintiffs' arguments that an action based on fraud on the court is permissible more than one year after a judgment, a decision that was endorsed by Fed.R.Civ.P. 60(b), it does not support Plaintiffs' arguments that any federal court may hear an action for fraud on the court and that compensatory damages are valid relief in such an action. Plaintiffs have cited the Advisory Committee Notes to the 1946 Amendments to Rule 60, which state that Rule 60(b) authorizes "a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment." However, this quote refers to the "independent action" for relief component of the savings clause, not the fraud on the court component, and the cases cited by the Plaintiffs are not supportive of any other position. *See Locklin v. Switzer Bros., Inc.,* 335 F.2d 331 (7th Cir.1964); *Hadden v. Rumsey Products, Inc.,* 196 F.2d 92 (S.D.N.Y.1952); *D'Addino v. Dulles,* 136 F.Supp. 417 (E.D.N.Y.1954).

Instead, the District Court of South Carolina's reasoning in *Chewning v. Ford Motor Co.,* 35 F.Supp.2d. 487 (D.S.C.1998) is persuasive on the dispositive issues that the parties have presented. *Chewning* was before the district court on a motion of the defendants to dismiss the matter on the pleadings. The plaintiffs alleged that, in a prior state court case, the defendants engaged in a pattern of hiding or destroying evidence and lawyer-assisted perjury which led to an adverse state court judgment against the plaintiffs. *Chewning,* 35 F.Supp.2d at 488. The

complaint contained a count for fraud on the court, as well as counts for fraud, non-disclosure, conspiracy, and spoliation of evidence, and the plaintiff sought "damages including special damages, punitive damages, equitable relief estopping [the Defendant in the state court action] from asserting the verdict procured by the Defendants' fraud and criminal acts, prejudgment interest, costs, attorneys' fees and such other relief as the Court deems proper." *Id.*

The *Chewning* court analyzed the Supreme Court's decision in *Hazel-Atlas,* as well as Fourth Circuit decisions in *Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters,* 675 F.2d 1349 (4th Cir.1982) and *Weisman v. Charles E. Smith Management, Inc.,* 829 F.2d 511, 513 (4th Cir.1987), and determined that Rule 60 does not authorize an independent action for damages and that "the proper forum in which to assert that a party has perpetrated a 'fraud on the court' is the court which allegedly was a victim of that fraud." *Chewning,* 35 F.Supp.2d at 491 (quoting *Weisman,* 829 F.2d at 513). Just as in the *Chewning* case, Plaintiffs in this case have not provided the Court with any authorities that suggest an independent action for damages in a separate court exists under Rule 60(b), particularly based on fraud on the court. The rationale employed by the *Chewning* court is also applicable: allowing damages claims such as these would permit relitigation of cases and issues and place before a jury a decision that is vested within the equitable powers of the court, and would also permit a party to subvert the balance of equities contained in Rule 60. *Chewning,* 35 F.Supp.2d at 491.

Plaintiffs argue that *Chewning* is not applicable because it was an action brought after a jury verdict was entered, whereas in this action the Plaintiffs settled their

claims. While the *Chewning* court began its analysis with the presumption that verdicts are binding absent reversal on appeal or direct authority allowing for relitigation, *see Chewning,* 35 F.Supp.2d at 488-89, there is a similar strong presumption in favor of enforcing settlements in both federal and Florida state courts. *See, e.g., Reed By and Through Reed v. U.S.,* 891 F.2d 878, 882 n. 3 (11th Cir.1990) ("Once an agreement to settle is reached, one party may not unilaterally repudiate it."); *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.,* 761 So.2d 306, 312-13 (Fla.2000). The distinction that Plaintiffs attempt to make based on the procedural posture of the cases is not persuasive. Furthermore, Plaintiffs veiled suggestion that the *Chewning* court's decision to remand that action to the original forum court somehow left open the possibility of a damage award under the court's equitable powers contradicts the plain language of the opinion holding that an independent action for damages is not a viable option and that the issues on remand are limited to a determination of whether the judgment should be set aside in favor of a new trial.

**4. Summary**

Based on the findings set forth above, the Court finds that it is appropriate to grant in part and deny in part Defendant's motion for judgment on the pleadings as to all damages claims based on litigation conduct. The motion is denied with respect to the federal civil RICO claims set forth in Counts Six and Seven, and granted as to all the remaining requests for relief. Thus, based on this analysis, Counts One, Two, Three, Four, Five, Eight, Nine, Ten, Eleven, and Thirteen are dismissed, and Counts Six, Seven, and Twelve remain.

### C. Reasonable Reliance

Defendant's second motion for judgment on the pleadings, based on Plaintiffs' inability to establish reasonable reliance as a matter of law, provides an alternative basis for dismissing Plaintiffs' claims.[13]

The elements of an action for fraud in the inducement under Florida law are: (1) misrepresentation of a material fact; (2) by someone who knew or should have known of the statement's falsity; (3) with intent that the representation would induce another to rely and act on it; and (4) injury suffered in justifiable reliance on the representation. *Hillcrest Pacific Corp. v. Yamamura,* 727 So.2d 1053, 1055 (Fla. 4th DCA 1999). DuPont's motion focuses on the fourth element's requirement that the plaintiffs must have justifiably relied on the representations.

#### 1. The *Mergens* Rule

In *Mergens v. Dreyfoos,* 166 F.3d 1114 (11th Cir.1999), *cert. denied,* 528 U.S. 820, 120 S.Ct. 63, 145 L.Ed.2d 55 (1999), the Eleventh Circuit Court of Appeals affirmed the

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[13] The Court notes that Plaintiffs allege in their Amended Complaint in this case that they "reasonably relied on the statements, conduct, testimony and/or other representations made by DuPont and its agents, and reasonably relied on DuPont and its agents to obey statutes, court orders, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by DuPont's officers and agents." Amended Complaint § 245. The Court need not accept this conclusory legal allegation in deciding a Rule 12 motion, and finds upon further analysis that it is an incorrect assertion of the law in this case. *See* 5A Wright & Miller, *Federal Practice and Procedure* § 1368 (2d ed.1990); *Kohen v. H.S. Crocker Co.,* 260 F.2d 790, 792 (5th Cir.1958).

district court's granting of judgment on the pleadings to the defendant. The claims in *Mergens* stemmed out of the negotiation and execution of a stock repurchase agreement between the parties. The agreement contained a merger clause and a general release applicable to all claims accrued as of the date of the agreement. Immediately after the plaintiffs were paid in full for their stock they learned that the company had sold its main asset for a significant profit, and they sought to rescind the agreement. The defendant refused, whereupon the plaintiffs brought suit, alleging, among other things, common law fraud in the inducement. Specifically, the plaintiffs alleged that the defendants misrepresented the cash flow and other assets of the subject company in order to induce them to sell at a below market price. *Mergens,* 166 F.3d at 1116.

The Eleventh Circuit established a bright-line test in *Mergens* regarding a party's legal right to rely on the representations of another party prior to entering an agreement which it succinctly stated as: "when negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties." *Mergens,* 166 F.3d at 1118 (quoting *Pettinelli v. Danzig,* 722 F.2d 706, 710 (11th Cir.1984)). Specifically, the Court of Appeals found in *Mergens* that reliance on the defendants' misrepresentations and/or omissions was unjustified, as a matter of law, because: (a) the plaintiffs were sophisticated players in the industry and were represented by counsel; (b) the parties had been in an adversarial relationship since well before the execution of the agreement; and (c) the existing controversy between the parties involved allegations of fraud and/or dishonesty by the defendants. *Mergens,* 166 F.3d at 1118. Based on this rule

and its application in *Mergens,* this Court is obliged to find that Plaintiffs cannot establish reasonable reliance and to grant DuPont's motion for judgment on the pleadings.[14]

The Plaintiffs in this case, as well as in the related Benlate cases, are individual growers and nurserymen and large incorporated nurseries. Plaintiffs were represented by legal counsel throughout the Underlying Litigation and those counsel were in contact with other Benlate plaintiffs' lawyers throughout the country and were monitoring other Benlate litigation to gain information. *See, e.g.,* First Amended Complaint §§ 2, 45, 54, 106, 166, 206, 224; Plaintiff's Reply to Counterclaim §§ 8, 11. Therefore, Plaintiffs and their counsel were knowledgeable and sophisticated actors in the Underlying Litigation from which the settlement agreement stemmed.

Furthermore, the parties in this case were in an extremely adversarial, litigious relationship prior to the execution of the agreement. Numerous other Benlate related lawsuits, including *Bush Ranch, Kawamata/Tomono, Ritter- Whitworth,* and *Lambert,* were filed against DuPont in the early 1990's, and those cases were

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[14] Part of Plaintiffs' argument centers around the contention that the case is not ripe for adjudication on a motion for judgment on the pleadings. *Mergens* itself is based on a district court order granting judgment on the pleadings despite having previously denied a Rule 12(b)(6) motion to dismiss, so it is clear that, under certain circumstances, judgment on the pleadings based on failure to establish reasonable reliance as a matter of law is appropriate. *See Mergens,* 166 F.3d at 1116-17. In this case, the First Amended Complaint, Counterclaim and Answer, and Reply to the Counterclaim, along with the attachments to each of those documents, are sufficiently detailed so as to resolve all the issues of material fact pertinent to this motion. Judgment on the pleadings is therefore appropriate in this case.

culminating in the first trials in 1994. The parties were aware of the stakes involved in such litigation, and, as evidenced by the discovery disputes and allegations of fraudulent discovery conduct in related Benlate cases, the litigation was contentious. Moreover, the Plaintiffs allege that DuPont's concealment and fraudulent conduct commenced on or before September 1991 and continued through the Underlying Litigation and to the present, thus taking place before, during, and after the litigation. Amended Complaint § 50. The pleadings make it clear that at all times, the parties were in an adversarial and contentious relationship.

In addition, one of the claims in the Underlying Complaint was for "Actual Fraud" against DuPont. Complaint and Request for Jury Trial, Count Nine (of Nine), *Green Leaf Nursery, Inc. v. E.I. DuPont de Nemours & Co., Inc.,* Case No. 92-20969 (Eleventh Judicial Circuit, Dade County, Fla.) (attached to Defendant's Motion to Dismiss Plaintiff's First Amended Complaint as Exh. A, D.E. 34). Specifically, the Underlying Complaint alleges that "Prior to the September 1989 recall, DuPont knew that Benlate was defective and despite this superior knowledge, knowingly continued to advertise, distribute, and sell Benlate as fit for its intended use without disclosure of Benlate's defects," and that "DuPont made false statements concerning the fitness of Benlate and omitted disclosure of the continued defects in the Benlate" even though it "knew that its representations concerning the fitness of Benlate were false." *Id.* §§ 68-71. Thus, the Underling Complaint involved allegations of fraud and dishonesty that were integrally related to the continued damaging use of Benlate over several years by the Plaintiffs.

### 2. Similarity of the First Fraud and the Subsequent Fraud[15]

Plaintiffs attempt to distinguish *Mergens,* as well as the prior Eleventh Circuit and Florida cases on which that decision is based (specifically, *Pettinelli v. Danzig,* 722 F.2d 706 (11th Cir.1984) and *Columbus Hotel Corp. v. Hotel Mgmt. Co.,* 116 Fla. 464, 156 So. 893 (1934)), by arguing that the fraudulent inducement claims do not arise from the same conduct as the claims asserted in the underlying product liability actions. Plaintiffs point to the fact that the Supreme Court of Florida, in analyzing whether an identical settlement agreement and release barred a claim for fraud, found that the "fraudulent inducement claim does not arise from the use or application of Benlate," *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.,* 761 So.2d 306, 315 (Fla.2000), and that the Supreme Court of Delaware found the torts related to the manufacture or distribution of Benlate and the tort of fraudulent inducement to settle to be "different sequentially and conceptually." *E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage,* 744 A.2d 457, 462 (De.1999). According to Plaintiffs, there is an inherent disconnect between their allegations in the underlying product liability litigation

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[15] Plaintiffs have brought to the Court's attention, and DuPont has acknowledged, that not every underlying complaint in the related Benlate settlement fraud cases that are before this Court contained an express allegation of fraud. The motion for judgment on the pleading based on reasonable reliance was filed in only this particular case, so the analysis has focused on the facts particular to this case. However, a general review of the complaints in the other cases reveals that similar issues will arise with respect to the other cases and that, as the law of the case, this Order will play an important role in resolving those issues.

that DuPont manufactured a defective product (Benlate) and fraudulently misrepresented that product's fitness for its intended use, and the current claims that DuPont fraudulently induced them into settling their underlying product liability claims by committing perjury and otherwise fraudulently concealing test data during the course of the related product liability litigations.

Of course, these arguments are only relevant if the Eleventh Circuit and Florida courts hold that a difference between the fraud claims in the underlying suit and the fraud claims in the fraudulent inducement case must concern the same subject matter. Plaintiffs have not directed the court to any authorities supporting this statement of the law, and generally Courts have not recognized such a difference as being significant. *See, e.g., Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581, 585-86 (11th Cir.1987) (finding that fraud claims based on the allegations that the defendant "lied about [their broker's] conduct in an effort to induce the [Plaintiffs] to sign the release" were barred where there was a relationship of mistrust established by Plaintiff's knowledge that defendant had used a fraudulent financial statement and had reason to believe their account was mismanaged); *Hall v. Burger King Corp.*, 912 F.Supp. 1509, 1524-25 (S.D.Fla.1995) (holding that plaintiffs could not rely on alleged misrepresentation concerning the terms of a signed release where they had previously realized they had been "lied to all along" by the defendant). Such a requirement would appear to blur the rule and lead to untenable results, since the misrepresentations that lead a party to settle a dispute would almost always differ in some manner from the allegations of fraud on which the original dispute was based. Because Plaintiffs have not

established that this distinction is relevant, their attempts to distinguish *Mergens* on this ground are unconvincing.

Moreover, the allegations of fraud and dishonesty in the Underlying Lawsuit are sufficiently related to the fraudulent conduct at issue in the settlement fraud suit so as to vitiate this concern. In the Underlying Lawsuit, the Plaintiffs alleged that DuPont intentionally concealed Benlate's defects, made false statements to the Environmental Protection Agency about its safety, and made false and misleading statements in public about the fitness of Benlate. Underlying Complaint, Count IX, §§ 67-73. In the current action, Plaintiffs allege that Defendants carried out a scheme to intentionally conceal material information regarding Benlate's defects from the Court and opposing parties, including Plaintiffs. *See, e.g.,* Amended Complaint §§ 5, 11. Although the means are alleged to be slightly different, both claims involve the same type of fraudulent activity. This similarity is reinforced by the allegations in the Amended Complaint in this case that the fraudulent scheme to conceal Benlate defects began on or before September 1991, a time period that encompasses the Underlying Complaint. Amended Complaint § 5.[16]

Not only were the general fraud allegations in the Underlying Complaint and the Amended Complaint in this action of a similar type, but the pleadings also reveal that Plaintiffs had knowledge that DuPont had been accused of

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[16] Plaintiff's have attempted to back pedal from this assertion by stating in their briefs to the Court that acts at issue in their current claims occurred only in 1993 and 1994. However, it is the unamended statements in the Plaintiffs' pleadings, not their arguments in a brief, that are accepted as true for purposes of this order.

discovery abuse in related cases prior to the signing of the settlement agreement and the subsequent dismissal of the Underlying Lawsuit. The Plaintiffs allege in the Amended Complaint that their attorneys were monitoring other Benlate litigation and were in close contact with other Benlate plaintiffs' attorneys around the country. Amended Complaint §§ 2, 94, 97, 106. The Plaintiffs have admitted that the *Bush Ranch* plaintiffs, in one of the cases that was particularly closely watched by Plaintiffs' and their attorneys, had accused DuPont of fraud, concealment of test data, and discovery abuse in 1993, before the settlement documents in the Underlying Lawsuit were executed and implemented. *See* Counterclaim § 40; Reply to Counterclaim § 20. Plaintiffs deny that the claims of fraud, concealment of test data, and discovery abuses asserted by the *Bush Ranch* plaintiffs are based on the same conduct by DuPont as the fraudulent inducement claims in this case. Reply § 20. Even accepting this denial as true, it is clear that DuPont was accused of dishonest and fraudulent conduct that was of a similar type to the conduct at issue in this case. Plaintiffs admit that the discovery abuses, including the withholding of valid evidence (different from the evidence at issue in this case), were found to be so severe in the *Bush Ranch* case that the Court threatened a directed verdict on more than one occasion in June 1993. Counterclaim §§ 42, 43; Reply §§ 22, 23. Similar allegations of discovery abuses involving the withholding of material, evidence and destroying data were filed against DuPont in the *Kawamata / Tomono* trial in July 1993. *See* Counterclaim §§ 68-72; Reply §§ 35-36. Plaintiffs have further admitted that the alleged fraud was known by Plaintiffs in September, 1994, almost a year prior to the dismissal of the Underlying Lawsuit. Counterclaim §§ 66-67; Reply §§ 3, 34. And, one week prior to the

dismissal of the Underlying Lawsuit, Judge Elliot issued a sanction order against DuPont containing numerous findings of discovery abuses that are substantially similar to the allegations of this complaint. Amended Complaint § 6.

Plaintiffs reliance on the *Florida Evergreen* and *Mazzoni* decisions handed down by the Supreme Courts of Florida and Delaware under the premise that those Courts determined that the fraud claim in the Underlying Lawsuit and the fraudulent inducement claim are not sufficiently related to permit application of the *Mergens* rule is not persuasive. Although those Courts found that product liability and settlement fraud claims constitute separate causes of action, they limited their analysis to the Complaints at issue, as they were required to do on a Rule 12 motion to dismiss, and did not consider whether there was an express accusation of fraud in the underlying complaint, as there is in this case, or the more developed allegations pertaining to fraudulent discovery conduct that the pleadings in this case reveal. The Supreme Court of Florida and Delaware focused on interpreting the release language and the parties' intent in entering those releases, and did not address the issues pertinent to the *Mergens* rule analysis. The Eleventh Circuit implicitly recognized this distinction when it remanded the justifiable reliance issue to this court in *Mazzoni. See Mazzoni Farms, Inc. v. E.I. Dupont De Nemours & Co.,* 223 F.3d 1275, 1276 n. 2 (11th Cir.2000).

### 3. Litigation Exception

Plaintiffs also argue that *Mergens, Pettinelli,* and *Columbus Hotel* are distinguishable because the fraudulent

conduct at issue in this case took place *during* the course of litigation, whereas the conduct at issue in the cases establishing the justifiable reliance rule took place *prior* to formal litigation procedures. This distinction, however, is not determinative and does not move this case outside the reach of the *Mergens* rule.

The Florida and Eleventh Circuit cases have not articulated a litigation exception to the *Mergens* reasonable reliance rule, although the parties in *Mergens, Pettinelli,* and *Columbus Hotel* were all involved in non-litigation adversarial disputes, involving allegations of fraud, that contractually settled, and one of the parties later alleged fraud. The reason for the absence of such a rule formulation is speculative, but may stem from the presence within Florida of absolute immunity for litigation conduct so long as such conduct relates to prior litigation, which this Court has already found is sufficient to bar Plaintiffs' fraudulent inducement claims. *See* Section B, Litigation Conduct, *supra; Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell v. United States Fire Ins. Co.,* 639 So.2d 606 (Fla.1994).

Plaintiffs argue that the fact that the conduct in this case took place during litigation, where DuPont, its agents, and its attorneys had a duty and an obligation to follow court orders and refrain from lying, renders their reliance on DuPont's misrepresentations and omissions reasonable. Plaintiffs cite the following passage from the Supreme Court of Delaware in support of their assertions:

> Candor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process. The rules of discovery demand no less. *Allstate Ins. Co., Inc. v. Walker,* Fla.Dist.Ct.App., 583 So.2d 356,

> 358 (1991) ("Candor towards the tribunal is essential to preserve the proper administration of justice."). The fraud alleged here, including the concealment of evidence during discovery, represents a wrong not only as to the releasing party but to the court as well. Additionally, if a party cannot release in good faith, the policy of encouraging the settlement of cases is in jeopardy.

*E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage,* 744 A.2d 457, 461 (Del.1999). Plaintiffs also point to the fact that the Florida Rules of Professional Conduct for attorneys demand candor and obedience to court orders, and argue that permitting DuPont to flaunt these principles and punishing Plaintiffs for relying on compliance with these established tenets of conduct would set a dangerous and morally indefensible precedent.

While the Court does not condone discovery violations, perjury, or the destruction or concealment of material evidence, the fact that DuPont's alleged fraudulent conduct took place in the context of litigation does not in and of itself render Plaintiffs' reliance reasonable. DuPont's conduct may be subject to criminal sanctions, contempt of court, or bar admonitions, and may even justify a determination by the original trial court that setting aside the judgment is warranted. However, in order to state a claim for damages, Plaintiffs' reliance on DuPont's fraudulent conduct must be reasonable, even if the misrepresentations occurred in court. *Mergens* itself involved allegations of securities fraud as well as fraud in the inducement, and the fraudulent statements that allegedly induced the contract were related to the amount and disposition of the defendant's assets in preparation for a securities transaction. As the Eleventh Circuit noted in a discussion of the Investment Advisors Act of 1940, "It requires but little

appreciation of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry." *United States v. Elliott,* 62 F.3d 1304, 1312 n. 9 (11th Cir.1995) (quoting *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 186-87, 84 S.Ct. 275, 280, 11 L.Ed.2d 237 (1963) (internal quotations and alterations omitted)). Thus, the parties in *Mergens* were under considerable obligations to act in good faith in their dealings with one another when the allegedly fraudulent conduct took place. Parties in the litigation context are usually in a more, not less, adversarial relationship than businessmen dealing at arm's length. *See, e.g., Eastern Air Lines, Inc. v. United States Aviation Underwriters, Inc.,* 716 So.2d 340, 343 (Fla. 3rd DCA 1998) (finding that parties who were previously in a fiduciary relationship were "clearly in the most adversarial of positions" during the litigation before the court). In this case, given the allegations of fraud in the Underlying Lawsuit between the parties, the extremely adversarial position of the parties in the lawsuit, the large number of cases around the country in which DuPont was being accused of flagrant discovery violations involving the concealment and destruction of evidence, and the Plaintiffs' continual monitoring of those other cases, it was unreasonable as a matter of law for Plaintiffs to rely on DuPont's representations in entering the settlement, and to permit the settlement to be implemented and the underlying case dismissed after knowledge of the fraud was fully known.

### 4. Due Diligence and Thwarting of Investigation

Plaintiffs have also seized upon the language in several cases stating that one of the factors to consider in evaluating reasonable reliance on another party's misrepresentations or omissions is whether the releasor demanded inquiry into relevant materials before signing the release.[17] *See Zelman v. Cook,* 616 F.Supp. 1121, 1133 (S.D.Fla.1985); *Hall v. Burger King Corp.,* 912 F.Supp. 1509, 1524 (S.D.Fla.1995). Plaintiffs argue that, unlike the plaintiffs in *Mergens,* they requested the specific materials in question through discovery, and that further investigation on their part was thwarted by the conduct of DuPont.

Even assuming that the Plaintiffs did attempt to conduct an investigation prior to claiming fraud, this fact is not determinative and does not obviate the application of the *Mergens* rule. DuPont's motion for judgment on the pleadings is not based on Plaintiffs' lack of diligence or failure to investigate the subject of the alleged misrepresentations and omissions, but instead focuses on the distrustful relationship between the parties. *See, e.g., Pieter Bakker Mgmt., Inc. v. First Federal Savings and Loan Assoc.,* 541 So.2d 1334, 1335-36 (Fla. 3rd DCA 1989).

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[17] *Zelman* and *Hall* also consider whether the releasor insisted that terms to protect him or her be inserted in writing into the release. In this case, Plaintiffs did not insist on any warranties or other protective provisions in the release, and there is no allegation that, in the context of settlement (as opposed to discovery requests in the Underlying Action and in related cases), Plaintiffs had inquired into relevant information or that DuPont had made any misrepresentations during the negotiations. This factor weighs in favor of finding that Plaintiffs' reliance was unreasonable.

Whereas *Zelman* and *Hall* noted that failure to conduct an adequate inquiry prior to signing a release might be a factor weighing in favor of finding that reliance could not be reasonable, actually requesting the information does not preclude a finding that reliance was unreasonable as a matter of law.

Furthermore, *Mergens* does not recognize an exception to the justifiable reliance rule where the plaintiff's investigations were frustrated or thwarted by the defendant's conduct. In *Mergens,* the plaintiffs alleged that prior to the stock transaction at issue, they had hired attorneys and accountants to investigate the company, but the defendants lied to these agents and misrepresented the cash flow and other assets of the company in order to induce the plaintiffs to sell at an artificially low price. *Mergens,* 166 F.3d at 1116. The Circuit Court specifically rejected the argument that plaintiffs could justifiably rely on misrepresentations made to neutral third parties because the third parties informed plaintiffs that they were relying on information from the defendants, the parties were in an adversarial relationship, and the plaintiffs knew that one of the purposes of the report was to induce a sale. *Id.* at 1118-19.

Plaintiffs' position in this case is also belied by the district court's opinion in the *Mergens* case. *See Mergens v. Dreyfoos,* 1997 WL 611576 (S.D.Fla.1997). After analyzing *Pettinelli* and its progeny, the district court found that the plaintiffs had not reasonably relied on the defendants' misrepresentations based on the following factors: (1) the "hostile and antagonistic relationship" between the parties; (2) the plaintiffs had been represented by both legal counsel and certified public accountants; (3) the plaintiffs were on notice that the information they were relying on

was provided to their agents by the defendants; and (4) the agreement was entered into to settle an existing controversy over fraud. *Mergens,* 1997 WL 611576 at *12. Furthermore, the district court flatly stated: "*Pettinelli* stands for the proposition that a plaintiff under the circumstances discussed *supra* is not justified in relying on the defendant for any representation, regardless of whether the truth of the representation is ascertainable." *Id.* at *12 n. 9. Thus, Plaintiffs cannot avoid application of the *Mergens* rule by arguing that they diligently investigated the underlying facts and/or were frustrated in their attempts to ascertain those facts. *See also Finn v. Prudential-Bache Securities, Inc.,* 821 F.2d 581, 586 (11th Cir.1987).

**5. Out-of-State Decisions**

Plaintiffs have asked the Court to follow the reasoning in *Chase v. Dow Chemical Co.,* 875 F.2d 278 (10th Cir.1989) in rejecting the application of *Pettinelli* and *Mergens* to this case. *Chase* involved an action to recover damages allegedly caused to the exterior masonry walls of plaintiffs' office building by a chemical product called Sarabond that was used in binding the brick walls. The evidence, on a motion for summary judgment, showed that the defendant had conducted research in 1972 that produced a technical report regarding Sarabond's corrosive tendencies. When cracks appeared on the front of plaintiffs' building in 1975, plaintiffs began communications with defendant, and between 1976 and 1980 the parties conducted inspections and researched the cause of the problem. Defendant never turned over the damaging 1972 report and feigned ignorance of the corrosive nature of its product. This led to defendant's recommendation of a sealing solution that did not address the problem with

their product and the signing of a release and indemnification agreement in 1981. Then, in 1985, plaintiffs happened to learn of the 1972 report and were forced to undergo major renovations to correct the corrosion caused by the Sarabond. *Chase,* 875 F.2d at 280-81.

Plaintiffs thereafter sued defendants for making false and misleading representations that induced them to enter into the release agreement. In finding that the plaintiffs had justifiably relied on defendant's representations, the Tenth Circuit Court of Appeals distinguished *Pettinelli.* First, the Court disagreed with the holding of *Pettinelli* and its doctrine regarding reasonable reliance, stating that, "we hold that a party is not categorically barred from relying on the representations of the opposing party when negotiating the settlement of a dispute which involves a claim for fraud." *Chase,* 875 F.2d at 283. Then the Circuit Court proceeded to distinguish *Pettinelli* on two grounds: (1) the underlying dispute between the parties regarding fraudulent marketing of defendant's product in the 1970's was characterized by the Circuit Court as primarily a property damage claim, not a fraud claim; and (2) the parties were not in a fully adversarial relationship when they entered into the release agreement, since plaintiff's [sic] believed defendant was sincere in its efforts to help.

It is not appropriate to follow the reasoning or the holding of *Chase* in this case. First, this Court is obligated to follow the holdings of *Pettinelli* and *Mergens* and their interpretation of the Florida law on reasonable reliance in fraud cases. The fact that *Chase* found this formulation unpersuasive is not binding on this Court. Second, the purported distinctions set forth by the Court in *Chase* to distinguish that case from *Pettinelli* are not present here.

As noted above, the underlying fraud in this case is similar in type to the fraudulent inducement claims that are currently before the Court, and Plaintiffs also had knowledge of similar types of conduct in other related lawsuits. Furthermore, the parties were in an extremely adversarial position when the settlement agreement was signed and executed in this case.

Plaintiffs have also relied on the quotations and reasoning from an Illinois appellate court decision, *Sims v. Tezak,* 296 Ill.App.3d 503, 230 Ill.Dec. 737, 694 N.E.2d 1015, 1020 (1st Dist.1998). However, that court expressly recognized that its interpretation of the law placed it squarely at odds with the law in some other jurisdictions, including Florida and the Eleventh Circuit. *Sims,* 296 Ill.App.3d *at* 511, 694 N.E.2d at 1020. The decision is therefore not binding or persuasive in this Court.

**6. Summary**

Based on the analysis set forth above, the Court finds that DuPont's motion for judgment on the pleadings based on reasonable reliance should be granted and that it serves as an alternative reason for dismissing Plaintiffs' fraud claims (Counts One, Two, Three, and Five). DuPont mentioned in a footnote of its initial brief in support of its motion for judgment on the pleadings based on reasonable reliance (*see* p. 7 n. 3 of the October 10, 2000 brief) that the federal RICO claims and tort claims other than fraud require that Plaintiffs prove proximate cause, and that, to the extent Plaintiffs' fraud claims fail as a matter of law for lack of justifiable reliance, their other claims fail as well. This argument was not fully developed by either party, and the Court is reluctant to pass on it without

giving the parties an opportunity to further address the matter. The limited treatment given to this topic by DuPont does not carry its burden of convincing the Court that extending the holding of this order to Plaintiffs' remaining claims is appropriate at this time.

## IV. Conclusion

DuPont's motions for judgment on the pleadings based on litigation conduct and reasonable reliance, filed only in Case No. 98-2246-Civ-Gold and resolved based on the pleadings in that case, specifically the First Amended Complaint, Answer and Counterclaim, and Reply, are granted in part and denied in part. Of the thirteen counts contained in the Amended Complaint, only Counts Six, Seven, and Twelve remain viable causes of action.

It is the opinion of this Court that, even though the disposition of the motions for judgment on the pleadings in this case does not completely dispose of all the matters in dispute between the parties, an immediate appeal to the Eleventh Circuit Court of Appeals is appropriate and should be permitted, by either or both parties. Pursuant to 28 U.S.C. § 1292(b), the district court may certify that an order is appropriate for interlocutory appeal if the court believes that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The motions decided by this Order were filed in only one of 34 consolidated Benlate settlement fraud cases that are currently pending before this court, but the implications are significant for all of the cases. Reasonable jurists could disagree with this

Court's interpretation of the Florida and Eleventh Circuit precedent regarding litigation conduct and reasonable reliance, and there is also a substantial question regarding the applicability of this decision to the remaining Benlate settlement fraud cases. Moreover, this Court has considered conducting a common issues trial in these consolidated cases, and resolution by the Court of Appeals of the appeal of this order through an interlocutory appeal will substantially assist in settling the issues involved in such a trial. This Court therefore certifies that an immediate appeal is in the best interests of materially advancing the ultimate termination of these lawsuits.

Accordingly, it is

**ORDERED AND ADJUDGED** that *DuPont's Motion for Judgment on the Pleadings As to All Damages Claims Based on Litigation Conduct,* filed on September 20, 2000, and *DuPont's Motion for Judgment on the Pleadings Based on Plaintiff's Inability to Establish Reasonable Reliance as a Matter of Law,* filed on October 10, 2000, are GRANTED IN PART AND DENIED IN PART, as set forth above. Counts One, Two, Three, Four, Five, Eight, Nine, Ten, Eleven, and Thirteen are DISMISSED, and Counts Six, Seven, and Twelve remain. It is further

**ORDERED AND ADJUDGED** that a separate order setting a status conference in this matter will be issued by the Court.

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2001 WL 1217312

United States District Court,
S.D. Florida.

FLORIDA EVERGREEN FOLIAGE and Louis Chang,
Plaintiffs,
v.
E.I. DU PONT DE NEMOURS AND COMPANY,
Defendant.

**No. 98-2256-CIV.**

Aug. 24, 2001.

Sean L. Moore, Esq., Fort Lauderdale, FL, *A. Camden Lewis*, Esq., *Thomas A. Pendarvis*, Esq., Lewis, Babcock & Hawkins, LLP, Columbia, SC, *Stephen T. Cox*, Esq., *David W. Moyer*, Esq., Cox & Moyer, San Francisco, CA, for Plaintiffs.

*Edward Moss*, Esq., Shook, Hardy & Bacon, LLP, Miami, FL, *A. Stephens Clay*, Esq., *William H. Boice*, Esq., *James F. Bogan, III*, Esq., Kilpatrick Stockton LLP, Atlanta, GA, Alice Hector, Esq., Lance Harke, Esq., Hector & Harke LLP, Miami, FL, for Defendants.

ORDER ON DUPONT'S MOTIONS FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS' RICO AND SPOLIATION CLAIMS

*GOLD*, District Judge.

THIS CAUSE is before the Court upon the following motions:

- *DuPont's Motion for Judgment on the Pleadings As to Plaintiffs' RICO Claims,*[1] filed on May 9, 2001, along with a separate brief in support of the motion. On June 10, 2001, DuPont filed a Notice of Intervening Authority.[2] Plaintiff-Growers filed an *Opposition* on June 28, 2001. DuPont filed a *Reply* on July 20, 2001.

- *DuPont's Motion for Judgment on the Pleadings As to Plaintiffs' Spoliation Claim,* filed on May 9, 2001. Plaintiff-Growers filed an *Opposition* on June 28, 2001, and DuPont filed a *Reply* on July 20, 2001.

- *Plaintiff-Growers' Motion to Amend their First Amended Complaint,* filed on August 1, 2001. DuPont filed a response memorandum setting forth its position regarding the effect of Plaintiffs' motion to amend on August 10, 2001, and Plaintiffs filed a reply memorandum

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[1] The motions for judgment on the pleadings that form the subject of this order come to the Court in the same procedural posture as the motions for judgment on the pleadings ruled upon by this Court on March 8, 2001. *See Florida Evergreen Foliage v. E.I. DuPont De Nemours,* 135 F.Supp.2d 1271 (S.D.Fla.2001). Just as was noted in that opinion, the motions for judgment on the pleadings were filed as case-specific pleadings in Case No. 98-2256-Civ-Gold. Case No. 98-2256-Civ-Gold is one of 34 related pending cases before this Court, all of which concern the same subject matter. DuPont is a defendant in 25 of these cases, including Case No. 98-2256-Civ-Gold, and a plaintiff in nine others. The Court has generally referred to the Claimant Growers as "Plaintiffs" or "Plaintiff-Growers," and DuPont as "Defendant," and will do so in this order.

[2] The Notice of Intervening Authority referred to *Cedric Kushner Promotions, Ltd. v. King,* ___ U.S. ___, 121 S.Ct. 2087, 150 L.Ed.2d 198 (June 11, 2001).

regarding the effect of the pending motion to amend on August 21, 2001.

Oral arguments on the motions for judgment on the pleadings were held on August 3, 2001.

DuPont seeks dismissal of Counts Six (Racketeering in violation of 18 U.S.C. § 1962(c)), Seven (Violation of 18 U.S.C. § 1962(d) by Conspiracy to Violate 18 U.S.C. § 1962(c)), and Twelve (Spoliation of Evidence) pursuant to Federal Rule of Civil Procedure 12(c).[3] After careful consideration of the parties' arguments, the applicable case law, and the record as a whole, the Court concludes that DuPont's Motion for Judgment on the Pleadings As to Plaintiffs' Rico Claims and DuPont's Motion for Judgment on the Pleadings as to Plaintiffs' Spoliation Claim should both be granted, and that Plaintiffs' Motion to Amend the Complaint should be denied at this time. Furthermore, as explained in the conclusion of this Order, the Court certifies that an interlocutory appeal by either or both parties is appropriate as to this Order.

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[3] Federal Rule of Civil Procedure 12(c) states:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

I. Background

The First Amended Complaint [D.E. 2], filed on October 22, 1998, contains thirteen claims for relief, as follows: Count 1, fraud; Count 2, intentional nondisclosure of material facts; Count 3, fraudulent inducement to settle; Count 4, fraud on the court under Fed.R.Civ.P. 60(b); Count 5, rescission and damages for fraud; Count 6, racketeering in violation of 18 U.S.C. § 1962(c); Count 7, violation of 18 U.S.C. § 1962(d) by conspiracy to violate 18 U.S.C. § 1962(c); Count 8, conspiracy; Count 9, abuse of process; Count 10, infliction of emotional distress; Count 11, interference with prospective economic advantage; Count 12, spoliation of evidence; and Count 13, violation of the Florida Deceptive and Unfair Trade Practices Act. Defendant DuPont filed a Counterclaim and Answer [D.E. 106] on May 24, 2000, and Plaintiff-Growers filed an Answer to DuPont's Counterclaim [D.E. 114] on June 13, 2000. In addition, Plaintiff-Growers filed a Local Rule 12.1 Civil Rico Case Statement on October 22, 1998 and a Local Rule 12.1 First Supplemental Civil Rico Case Statement on June 26, 2001. Both parties relied upon the Plaintiff-Growers' RICO Case Statements in conjunction with these matters, and the Court considered them as part of the pleadings relied upon to resolve the pending motions. In considering the pleadings, all ambiguities and inferences were interpreted in the light most favorable to the Plaintiff-Growers.

The Court set forth the background of this dispute in its March 8, 2001 Order on DuPont's Motions for Judgment on the Pleadings [D.E. 224] (the "March 8, 2001 Order"), and that order is incorporated herein by reference. *See Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.,* 135 F.Supp.2d 1271, 1274-76 (S.D.Fla.2001). In sum, Plaintiffs'

claims arise out of a prior lawsuit filed in Florida state court in 1992, in which Plaintiffs alleged products liability based on property damage caused by DuPont's fungicide Benlate and actual fraud claims based on DuPont's alleged concealment of Benlate's defects (the "Underlying Lawsuit"). In 1994, Plaintiffs settled these underlying claims and eventually dismissed their lawsuit with prejudice.

Plaintiffs then filed the instant action, alleging that during the course of the litigation of the Underlying Lawsuit, DuPont wrongfully, illegally, and fraudulently withheld from discovery vital scientific data and information that DuPont was under an obligation to produce in the Underlying Lawsuit and in other related Benlate litigation being conducted simultaneously in other courts, which Plaintiffs' attorneys were monitoring, and gave false testimony in other Benlate cases about Benlate's alleged defects. Plaintiffs allege that DuPont withheld the information and made false statements in the implementation of a scheme to defraud Plaintiffs and others who had used Benlate and suffered resulting damage. As a result of the scheme and fraud, Plaintiffs allege that they were induced to settle the Underlying Lawsuit for less money than they would have otherwise insisted upon and been able to obtain.

The Court's March 8, 2001 Order granted in part and denied in part DuPont's previous motions for judgment on the pleadings. Counts One, Two, Three, Four, Five, Eight, Nine, Ten, Eleven, and Thirteen were dismissed. With respect to Counts Six and Seven, the civil RICO claims, the Court denied DuPont's motion for judgment on the pleadings based on litigation conduct, and deferred from reaching the issue under DuPont's motion for judgment on the pleadings based on reasonable reliance because the

parties had not fully addressed the RICO claims in that context. Count Twelve, spoliation, was not addressed by the previous motions for judgment on the pleadings.

## II. Standard of Review

Judgment on the pleadings is appropriate where no issue of material fact remains unresolved and the moving party is entitled to judgment as a matter of law. *See Ortega v. Christian,* 85 F.3d 1521, 1524 (11th Cir.1996). When reviewing judgment on the pleadings, the court must take the facts alleged in the complaint as true and view them in the light most favorable to the nonmoving party. *Id.* at 1524. A complaint may not be dismissed on a motion for judgment on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hawthorne v. Mac Adjustment, Inc.,* 140 F.3d 1367, 1370 (11th Cir.1998). The pleadings considered by the court on a motion for judgment on the pleadings include the complaint, answers, counterclaim, and cross-claim, if any. *See Santmyer v. Prudential Ins. Co. of Am.,* 761 F.Supp. 114, 117 (M.D.Fla.1991).

## III. Discussion

### A. Counts Six and Seven: Plaintiffs' RICO Claims

Plaintiffs seek relief in Counts Six and Seven for violations of the federal civil RICO act, 18 U.S.C. § 1962(c)

and (d).[4] Plaintiffs allege that mail fraud, in violation of 18 U.S.C. § 1341, wire fraud, in violation of 18 U.S.C. § 1343, obstruction of justice, in violation of 18 U.S.C. § 1503, and tampering with witnesses, in violation of 18 U.S.C. § 1512, constitute the relevant "predicate offenses" for a civil RICO action. The Amended Complaint alleges that DuPont formed an enterprise with others for the purpose of defrauding the Benlate claimants, including the above named Plaintiffs, in order to diminish the value of the Benlate claimants' claims. The offending conduct is alleged to include intentional concealment of the Alta Labs documents and data; the BAM and BPM documents (concerning Benlate testing by other labs-*see* First Amended Complaint §§ 146-190), the test results identifying contamination in the Bartlo lots, and the Costa Rica testing information, misleading and fraudulent answers to discovery requests, false and deceptive responses to court orders to produce, and false deposition testimony and statements by DuPont's attorneys to the courts in *Bush Ranch v. DuPont,* No. 4:95-CV-36(JRE), United States District for the Middle District of Georgia, *Kawamata v. United Agri Products,* Civ. No. 91-437, Circuit Court of the Third Circuit, State of Hawaii, *Tomono v. DuPont,* Civ. No. 92-247K,

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[4] In relevant part, 18 U.S.C. § 1962 provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Circuit Court of the Third Circuit, State of Hawaii, *Billy Lambert v. DuPont,* Florida Circuit Court, *Ritter-Whitworth v. DuPont,* Florida Circuit Court, *Smith v. DuPont,* Florida Circuit Court, and *Davis Tree Farms, Inc. v. DuPont,* Florida Circuit Court, as well as intimidating and impeding witnesses in the *Bush Ranch v. DuPont, Native Hammock, Inc. v. DuPont* and *Asia Pacific v. DuPont* cases.

The provisions of 18 U.S.C. § 1961, *et seq.* (the RICO Act) provide civil and criminal liability for persons engaged in "a pattern of racketeering activity." *See* 18 U.S.C. § 1962(a-d). Persons injured by reasons of a RICO violation have a civil cause of action under the terms of the act. *See* 18 U.S.C. § 1964. The four elements of civil RICO liability are (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Durham v. Business Mgmt. Assocs.,* 847 F.2d 1505, 1511 (11th Cir.1988) (internal quotation omitted). Plaintiffs in such an action must identify and prove a pattern of racketeering activity, defined as two "predicate acts" of racketeering activity within a 10 year period. *See* 18 U.S.C. § 1961(5). The phrase "racketeering activity" is defined as including any act which is indictable under a lengthy list of criminal offenses, including the federal statutes prohibiting mail and wire fraud, obstruction of justice, and tampering with witnesses. *See* 18 U.S.C. § 1961(1).

DuPont has advanced three arguments for dismissal of the Plaintiff-Growers' RICO claims that the Court finds persuasive and dispositive.[5] The first two arguments focus

[5] DuPont also argued in its pleadings and before the Court at oral argument that Count Six and Seven should be dismissed because Plaintiffs' fail to articulate a cognizable RICO enterprise, fail to

(Continued on following page)

on the predicate act requirements of a civil RICO action. DuPont argues first that the mail fraud and wire fraud allegations fail as predicate acts because Plaintiffs cannot establish reasonable reliance, and second, that the obstruction of justice and intimidation of witness claims fail as predicate acts because Plaintiffs do not meet the proximate cause standards required by the applicable precedent. DuPont submits that if these arguments prevail, then Plaintiffs have failed to allege valid predicate acts, and the RICO claims fail. Third, DuPont argues that Plaintiffs' claims are separately and independently barred by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), at 18 U.S.C. § 1964(c).[6] As explained more fully below, dismissal of Counts Six and Seven is both necessary and appropriate on these grounds.

1. RICO Predicate Acts

DuPont's arguments with respect to the predicate act requirements of RICO focus on Plaintiffs' failure to allege injuries proximately and directly caused by DuPont's alleged racketeering activity. In order for a pattern of racketeering activity to be a cognizable cause of civil RICO injury to a private plaintiff, one or more of the predicate

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properly allege that they have suffered injury to their business or property, and fail to allege any conduct by DuPont that was intended to achieve a benefit to DuPont that was external to the Underlying Litigation. Because the Court finds the three arguments set forth below dispositive, DuPont's remaining arguments have not been reached.

[6] 18 U.S.C. § 1964(c) provides, in pertinent part, that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962."

acts must not only be the 'but for' cause of the injury, but the proximate cause as well. *See Holmes v. Securities Investor Prot. Corp.,* 503 U.S. 258, 268, 112 S.Ct. 1311, 1317-18 (1992); *Beck v. Prupis,* 162 F.3d 1090, 1095-96 (11th Cir.1998). A wrongful act is "a proximate cause if it is a substantial factor in the sequence of responsible causation." *Cox v. Administrator United States Steel & Carnegie,* 17 F.3d 1386, 1399 (11th Cir.1994) (internal quotation omitted); *see also Brandenburg v. Seidel,* 859 F.2d 1179, 1189 (4th Cir.1988) (stating that the inquiry in determining the existence of proximate cause is "whether the conduct has been so significant and important a cause that the defendant should be held responsible"). Plaintiffs must show a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes,* 503 U.S. at 268, 112 S.Ct. at 1318.

a. Mail and Wire Fraud

As noted above, Plaintiff-Growers allege that mail and wire fraud (along with obstruction of justice and tampering with witnesses, which are addressed separately) constituted the relevant "predicate offenses" for the instant civil RICO action. The substantive elements of mail and wire fraud are identical (the only difference between the two offenses being their jurisdictional basis). *See Beck,* 162 F.3d at 1095. Mail or wire fraud occurs when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme. *Pelletier v. Zweifel,* 921 F.2d 1465, 1498 (11th Cir.1991).

To demonstrate a violation of the mail or wire fraud statutes, Plaintiffs must show that DuPont, "had a conscious, knowing intent to defraud and that a reasonably

prudent person would have been deceived by [DuPont's] misrepresentations," *Pelletier,* 921 F.2d at 1503, and that the Plaintiffs in fact did suffer injury and rely to their detriment on the misrepresentations, *see id.* at 1499. Thus, in order to establish proximate causation in a civil RICO action predicated on fraud, the purported victim must make the same showing of reasonable reliance that is required for establishing injury from common law fraud. *See Pelletier,* 921 F.2d at 1499 ("Mail and wire fraud, just like common law fraud, . . . entail 'an intention to induce the [victim] to act or to refrain from action in reliance upon the misrepresentation.'") (*citing* Prosser and Keeton on Torts 728 (5th ed.1984)); *Beck,* 162 F.3d at 1095 (stating that RICO fraud claims require that the plaintiff "prove that a reasonable person would have relied on the misrepresentation"). Furthermore, several other circuits recognize that a racketeering claimant must reasonably rely upon alleged mail or wire fraud to satisfy RICO's proximate cause requirements. *See, e.g., In re EDC, Inc.,* 930 F.2d 1275, 1280 (7th Cir.1991) (stating that the civil RICO claimants in the case, "can complain only of misrepresentations which were made to them and on which they reasonably relied"); *Chisolm v. TranSouth Fin. Corp.,* 95 F.3d 331, 337 (4th Cir.1996) (stating that in civil RICO fraud actions, "the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation").

The Court's March 8, 2001 Order granted DuPont's motion for judgment on the pleadings based on Plaintiffs' inability to establish reasonable reliance, finding that Plaintiffs' fraud claims (Counts One, Two, Three, and Five) failed as a matter of law. *See Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.,* 135 F.Supp.2d 1271,

1289-97 (S.D.Fla.2001). That Order relied primarily on *Mergens v. Dreyfoos,* 166 F.3d 1114 (11th Cir.1999) and its progeny for the proposition that, "when negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest party." *Mergens,* 166 F.3d at 1118 (*quoting Pettinelli v. Danzig,* 722 F.2d 706, 710 (11th Cir.1984)). Just as Plaintiffs could not establish, as a matter of law, justifiable reliance with respect to Plaintiffs' fraud in the inducement claims, they also cannot establish, for the reasons set forth in the March 8, 2001 Order and incorporated herein, justifiable reliance with respect to Plaintiffs' RICO mail and wire fraud claims.[7]

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[7] With regard to the mail and wire fraud claims, the Court stated the following in the March 8, 2001 Order:

> DuPont mentioned in a footnote of its initial brief in support of its motion for judgment on the pleadings based on reasonable reliance . . . that the federal RICO claims and tort claims other than fraud require that Plaintiffs prove proximate cause, and that, to the extent Plaintiffs' fraud claims fail as a matter of law for lack of justifiable reliance, their other claims fail as well. This argument was not fully developed by either party, and the Court is reluctant to pass on it without giving the parties an opportunity to further address the matter. The limited treatment given to this topic by DuPont does not carry its burden of convincing the Court that extending the holding of this order to Plaintiffs' remaining claims is appropriate at this time.

*Florida Evergreen,* 135 F.Supp.2d at 1297. The parties have now had an opportunity to present this issue directly to the Court, and DuPont's arguments regarding the applicability of the reasonable reliance standard to the federal RICO claims based on fraud are persuasive.

Plaintiffs argue that the *Mergens/Pettinelli* rule is an anomaly of Florida state law that is inconsistent with tort law principles applied throughout most of the rest of the country, and that it would frustrate the purposes of RICO. The Court disagrees.

The *Mergens* decision represents the straightforward application of the reasonable reliance requirement to a particular factual setting: a setting in which the plaintiffs were sophisticated actors, the parties had been in an adversarial relationship since well before the execution of the agreement at issue, and the plaintiffs had entered into the agreement to settle an existing lawsuit that claimed fraud. *See Mergens,* 166 F.3d at 1118. The Eleventh Circuit found that in such a situation, a party has no legal right to rely on the representations of the other party, *id.,* and that such a finding is consistent with the applicable precedent. *See id.* ("[I]n factual situations substantially similar to this action, this Circuit and various district courts have held that the plaintiffs were unjustified in relying on representations made by the defendants.").

The fact that the *Mergens/Pettinelli* rule involved an interpretation of Florida state law does not invalidate the application of the state law interpretation of the reasonable reliance standard to this case. As the United States Supreme Court has instructed, "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law." *De Sylva v. Ballentine,* 351 U.S. 570, 580, 76 S.Ct. 974, 980, 100 L.Ed. 1415 (1956). Generally, unless there is a distinct need for uniform national standards or there are express provisions in analogous statutory schemes that clearly embody congressional policy choices readily applicable to the matter at hand,

"federal courts should incorporate state law as the federal rule of decision, unless application of the particular state law in question would frustrate specific objectives of the federal programs." *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 98, 111 S.Ct. 1711, 1717 (1991) (internal quotation omitted).

In the RICO context, federal courts have consistently applied state law principles to interpret gaps in the federal RICO statute. *See, e.g., In re Sunrise Sec. Litig.,* 916 F.2d 874, 879-82 (3rd Cir.1990) (applying Florida corporate law on shareholder derivative suits to determine standing in a federal RICO case); *Prince Heaton Enters., Inc. v. Buffalo's Fran. Concepts, Inc.,* 117 F.Supp.2d 1357, 1362-63 (N.D.Ga.2000) (utilizing state law reasonable reliance principles to reject a federal civil RICO claim); *Harper v. American Tel. & Tel. Co.,* 54 F.Supp.2d 1371, 1382-84 (S.D.Ga.1999) (rejecting federal civil RICO mail and wire fraud claims for failure to demonstrate reasonable reliance). In fact, by its express terms, the RICO statute incorporates many state law offenses as predicate acts, and state courts have concurrent jurisdiction over civil RICO claims. *See* 18 U.S.C. § 1961(1)(A) (listing state law offenses constituting predicate acts); *Tafflin v. Levitt,* 493 U.S. 455, 465, 110 S.Ct. 792, 798 (1990) (noting that "many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise"). It is thus appropriate for state law precedents on fraud law, such as *Mergens* and *Pettinelli,* to inform the disposition of federal civil RICO claims.

Plaintiff-Growers argue that application of the *Mergens/Pettinelli* rule to civil RICO cases would frustrate the purposes of RICO because the RICO statute is designed to expand the remedies available under state law to victims

of racketeering. Generally, "unless state law on the issue . . . is inconsistent with the federal policy underlying RICO, it should not be displaced simply because plaintiffs base their claim on a federal statute." *In re Sunrise Sec. Litig.*, 916 F.2d at 879. "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Burks v. Lasker*, 441 U.S. 471, 479, 99 S.Ct. 1831, 1838 (1979) (citation omitted). Under this policy, state rules that are unreasonable, specifically aberrant or hostile to the federal right at issue will not be applied. *Id.* In this case, requiring the Plaintiffs to prove proximate causation and justifiable reliance is not a new rule, and the incorporation of state law justifiable reliance concepts is consistent with prior precedent. Enforcing these requirements is therefore not incompatible with the policies underlying the statute.

b. Obstruction of Justice and Intimidation of Witnesses

Accepting that mail and wire fraud are eliminated as predicate acts because reasonable reliance is a requirement to prove mail fraud or wire fraud, as the analysis set forth above demonstrates, and reasonable reliance cannot be shown under the Plaintiffs' allegations, as set forth in the March 8, 2001 Order, Plaintiffs' [sic] are left with their allegations of obstruction of justice and intimidation of witnesses as the alleged predicate acts. DuPont concedes that reasonable reliance is not an issue with respect to obstruction of justice and intimidation of witnesses.

As an initial matter, the Court observes that the federal obstruction and witness intimidation claims are only applicable to federal proceedings. *See Florida Evergreen*, 135 F.Supp.2d at 1286 n. 10 ("[S]everal federal

courts have held that 18 U.S.C. §§ 1503 [obstruction of justice] and 1512 [tampering with witnesses] do not apply to state court proceedings.") (*citing O'Malley v. New York City Transit Auth.*, 896 F.2d 704, 707 (2nd Cir.1990) and *Park South Assoc. v. Fischbein,* 626 F.Supp. 1108, 1113 (S.D.N.Y.1986)). The only federal case in which Plaintiffs allege any of the predicate acts took place is *Bush Ranch v. DuPont,* No. 4:95-CV-36(JRE), in the United States District Court for the Middle District of Georgia. Accordingly, the federal obstruction and witness intimidation claims are only actionable to the extent that they relate to the *Bush Ranch* case. Plaintiffs were not parties to the *Bush Ranch* case, but allege that their attorneys were monitoring other Benlate litigation, including the *Bush Ranch* case, and were in close contact with other Benlate plaintiffs' attorneys around the country. Amended Complaint, §§ 2, 94, 97, 106; *see also Florida Evergreen,* 135 F.Supp.2d at 1292.

DuPont argues that the Plaintiffs cannot show that the alleged predicate acts, which took place in the *Bush Ranch* case, were the proximate cause of their injury. In support of this argument, DuPont relies primarily on *Holmes v. Secs. Investor Prot. Corp.,* 503 U.S. 258, 112 S.Ct. 1311 (1992), and *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.,* 140 F.3d 898 (11th Cir.1998). In *Holmes,* the United States Supreme Court articulated the proximate cause requirement in federal civil RICO cases, describing it as a "direct relation between the injury asserted and the injurious conduct alleged," and acknowledging that, "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes,* 503 U.S. at 268-69,

112 S.Ct. at 1318. Part of the rationale for the proximate causation requirement is: (a) difficulty in ascertaining the amount of the plaintiff's damages attributable to the violation as the injury becomes less direct; (b) difficulty in apportioning damages amongst plaintiffs removed at different levels of injury from the violative acts; and (3) the likelihood that directly injured victims will act to vindicate the law as private attorneys. *Id.* at 269-70, 112 S.Ct. at 1318. The *Bivens* case is applicable to the extent the Eleventh Circuit emphasized that RICO standing must be interpreted narrowly and in accordance with *Holmes,* and that only injuries directly caused by the RICO violation are actionable. *See Bivens,* 140 F.3d at 908.

Plaintiffs argue in response that they have adequately alleged in their Local Rule 12.1 First Supplemental Civil Rico Case Statement that they were directly injured by DuPont's misrepresentations in the *Bush Ranch* case. According to Plaintiffs, DuPont certainly knew that the Plaintiffs were monitoring the evidence presented in the *Bush Ranch* case, and DuPont's racketeering activities were intended to hide and falsify evidence presented in the *Bush Ranch* case in order to defeat cases throughout the country. In support, Plaintiffs specifically refer to the language used by Judge Elliot in his August 25, 1995, sanctions opinion: "Having heard and reviewed all of the relevant evidence, the Court concludes that DuPont, in light of the hundreds of claims and lawsuits which had arisen out of the use of its product Benlate 50DF, decided that it would not reveal the potentially damaging evidence generated by the Alta tests." *In re: E.I. duPont de Nemours & Co.,* 918 F.Supp. 1524, 1555 (M.D.Ga.1995), *rev'd,* 99 F.3d 363 (11th Cir.1996).

The Court agrees with DuPont's arguments that the alleged injuries to the Plaintiffs in this case are too remote to satisfy civil RICO's proximate cause requirements. The parties who were directly injured by DuPont's actions in the *Bush Ranch* case were the *Bush Ranch* plaintiffs and the allegedly defrauded court. For reasons of policy, practicality and proof, RICO prefers that those who were directly injured "vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely," *Holmes,* 503 U.S. at 269-70, 112 S.Ct. at 1318, and those who were injured more directly have indeed done so in this case. *See Florida Evergreen,* 135 F.Supp.2d at 1283 ("DuPont has already been subject to reprimands and monetary sanctions for its actions by some of the courts in which it is alleged to have committed its tortious behavior."). Even accepting Plaintiffs' allegations as true and interpreting them in the light most favorable to the Plaintiffs, it is clear that DuPont's actions were directed primarily at the *Bush Ranch* litigants, with the anticipation that other parties might rely on or be influenced by what happened in the *Bush Ranch* case. As noted by the Eleventh Circuit, "the test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable." *Bivens,* 140 F.3d at 908. Plaintiffs' arguments that it must have known its scheme would impact other cases around the country and their presentation of a laundry list of allegedly fraudulent discovery practices in *Bush Ranch* and other Benlate litigations in the Supplemental RICO Case Statement do not satisfy RICO's directness requirement.

Furthermore, Plaintiffs' reliance on Judge Elliot's findings and conclusions in the August 25, 1995 *Bush*

*Ranch* sanction opinion is improper. As noted by this Court in *Gutter v. E.I. Dupont De Nemours,* 124 F.Supp.2d 1291, 1295 (S.D.Fla.2000), the Eleventh Circuit reversed and remanded the Georgia district court's sanction opinion on the ground that the sanctions were punitive and that the district court had not followed applicable criminal procedures. Although this Court relied tangentially on the *Bush Ranch* findings in the September 20, 2000 *Gutter* opinion, it did so only to the extent that those findings were adopted by the Hawaii Circuit Court and Hawaii Supreme Court, which considered the complete transcript of Judge Elliot's hearing. *See Gutter,* 124 F.Supp.2d at 1297 n. 4. The Eleventh Circuit did not adopt the factual findings of the Georgia district court, and it would be error for the Court to rely on those factual findings, standing alone, to support Plaintiffs' arguments in this case.

Accordingly, the Court finds that Plaintiffs have failed to adequately allege justifiable reliance on acts of mail and/or wire fraud, and have not adequately stated sufficient proximate cause between the alleged acts of obstruction of justice and witness tampering in *Bush Ranch v. DuPont* and the Plaintiffs' injuries. Thus, absent any valid predicate acts, the Plaintiffs have failed to state a valid claim for RICO violations. Both Counts Six and Seven must therefore be dismissed. *See Lightning Lube, Inc. v. Witco Corp.,* 4 F.3d 1153, 1191 (3rd Cir.1993) ("Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient.").

2. Reform Act Bar

DuPont argues, as a separate and independent grounds for granting judgment on the pleadings in its favor, that Plaintiffs' RICO claims are barred by Section 107 of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), codified at 18 U.S.C. § 1964(c). Specifically, DuPont relies on the language providing that, "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962," unless the person who committed such fraudulent conduct has been criminally convicted. 18 U.S.C. § 1964(c) & Historical and Statutory Notes appended thereto. DuPont argues that the Plaintiffs' civil RICO claims are subject to dismissal since the conduct relied upon by the Plaintiffs to support their racketeering claims is also the subject of *Gutter v. DuPont,* Case No. 95-2152-Civ-Gold, a certified securities fraud class action currently pending before this Court.

In enacting the 1995 Amendments to the PLSRA, Congress sought to remove any conduct that would have been actionable as fraud in the purchase or sale of securities as racketeering activity under civil RICO. *District 65 Retirement Trust for Members of Bureau of Wholesale Sales Reps. v. Prudential Secs., Inc.,* 925 F.Supp. 1551, 1567 (N.D.Ga.1996) (*quoting* 141 Cong. Rec. H13691-08, H13704 (Nov. 28, 1995)). The amendment eliminated securities fraud as a predicate offense, as well as other specified offenses, such as mail or wire fraud, if such offenses are based on conduct that would have been actionable as securities fraud. *Id.*

In this case, the Court has before it the type of situation contemplated by the Section 107 bar: one in which the

same conduct giving rise to the present lawsuit is alleged to be securities fraud. *See Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.,* 189 F.3d 321, 330 (3rd Cir.1999); *Howard v. America Online Inc.,* 208 F.3d 741, 749-50 (9th Cir.2000); *In re Ikon Office Solutions, Inc. Sec. Litig.,* 86 F.Supp.2d 481, 486-87 (E.D.Pa.2000). In addition to Case No. 98-2256-Civ-Gold and the consolidated related Benlate settlement fraud cases that are pending before this Court, this Court also has before it a pending Benlate securities fraud action, *Gutter v. E.I. Dupont De Nemours & Co.*, Case No. 95-2152-Civ-Gold. The *Gutter* action alleges that DuPont and its former CEO violated securities laws "by concealing and misrepresenting material facts regarding the likelihood and magnitude of DuPont's potential liability in connection with thousands of product liability lawsuits regarding a DuPont agricultural product called Benlate." *Gutter v. E.I. Dupont De Nemours & Co.,* 124 F.Supp.2d 1291, 1295 (S.D.Fla.2000). Similarly, the instant action "alleges that during the course of the litigation of the Underlying Lawsuit, DuPont wrongfully, illegally, and fraudulently withheld from discovery vital scientific data and information . . . and made false statements in implementation of a scheme to defraud Plaintiffs and others who had used Benlate. . . ." *Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.,* 135 F.Supp.2d 1271, 1275-76 (S.D.Fla.2001); *see also* Compl. § 45. Moreover, not only do the *Gutter* action and this action allege the same type of concealment, but they both also concentrate on the same concealment activities: (1) "DuPont Field Tests" (*compare Gutter,* Compl. §§ 32-33, 35, *with Green Leaf,* Compl. §§ 45, 48); (2) "Costa Rica tests" (*compare Gutter,* Compl. §§ 33-35, 92, *with Green Leaf,* Compl. §§ 191-227); (3) "*Bush Ranch* – ALTA data" (*compare Gutter,* Compl. §§ 42-58, 97, *with Green Leaf,* Compl. §§ 49, 52-97); (4) "*Lambert* – ALTA data"

(*compare Gutter,* Compl. §§ 67-71, 97, *with Green Leaf,* Compl. §§ 98-104); (5) "*Ritter/Whitworth* – ALTA data" (*compare Gutter,* Compl. §§ 72-79, 97, *with Green Leaf,* Compl. §§ 137-45); and (6) "*Kawamata/Tomono*" (*compare Gutter,* Compl. §§ 88-90, *with Green Leaf,* Compl. §§ 105-36). Accordingly, because the conduct upon which Plaintiffs rely in this case parallels the conduct that underlies the *Gutter* Benlate securities fraud action, it is appropriate to apply the PLSRA bar to effectuate dismissal of the RICO claims.

Plaintiffs have raised five arguments in opposition to the application of the PLSRA bar to Counts Six and Seven, as follows: (1) the legislative history of the act indicates an intention to target abusive practices not present in Plaintiff's action; (2) the act only operates to bar civil RICO claims if the claims could be actionable by the same plaintiff; (3) the predicate acts of racketeering upon which the RICO claims is brought are sufficiently removed from any securities violation which would trigger the bar; (4) even if the PLSRA bar is implicated, DuPont's criminal culpability lifts the bar; and (5) the act does not apply retroactively. None of Plaintiffs' arguments are persuasive.

First, Plaintiffs argue that the legislative history of the act clearly indicates an intention to target abusive practices not present in the Plaintiffs' action, i.e., that the purpose of the act was to prevent securities litigation from becoming inundated with abusive and meritless suits. However, nothing in the plain language of 18 U.S.C. § 1964(c) indicates any delineation between "abusive" and "non-abusive" suits; the statute clearly provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." Moreover, the very

authority cited by Plaintiff, *Rowe v. Marietta Corp.*, 955 F.Supp. 836, 847 (W.D.Tenn.1997) (*citing* Testimony of Hon. Arthur Levitt, Chairman of the SEC, Hearings on H.R. 10, the Common Sense Legal Reform Act of 1995, before the Telecommunications and Finance Subcommittee of the House Commerce Committee, February 10, 1995, *reprinted in* 1996 U.S.C.C.A.N. 679, 746), stands for the proposition that the PLSRA bar was meant to protect defendants from overlapping exposure under the federal securities laws and the PLSRA for the same underlying conduct. Therefore, application of the Section 107 bar in this case is consistent with the PLSRA's legislative purposes.

Second, Plaintiffs argue that Section 107 only operates to bar civil RICO claims if the claims could be actionable by the same plaintiff. However, Plaintiffs have done nothing to distinguish *Howard v. America Online Inc.*, 208 F.3d 741 (9th Cir.2000), and the Court finds that case persuasive. In *Howard,* a group of AOL subscribers claimed that AOL committed securities fraud as part of a pattern of racketeering activity. The Ninth Circuit Court of Appeals held that Section 107 of the PSLRA, codified at 18 U.S.C. § 1964(c), acted to bar their claim despite the fact that the named plaintiffs did not have standing to bring a securities fraud claim against AOL because the alleged conduct "could be brought by a plaintiff with proper standing." *Howard,* 208 F.3d at 749. Similarly, the fact that Plaintiff-Growers are not DuPont shareholders and therefore cannot bring a securities fraud claim against DuPont does not preclude the use of Section 107 to bar their claim.

Third, Plaintiffs claim that there are differences between their case and *Gutter* sufficient to defeat operation of the Section 107 bar. However, as noted above, both

cases are based on the same underlying conduct. The basic theories of concealment of evidence and misrepresentation are parallel, and both complaints rely on the same six episodes of alleged concealment. As such, Plaintiffs' attempts to distinguish the two cases are unavailing. Furthermore, the primary case relied upon by Plaintiffs to support their argument, *Florida Dep't Ins. v. Debenture Guar.,* 921 F.Supp. 750 (M.D.Fla.1996), was filed on November 6, 1995 (*see Florida Dep't Ins.,* 921 F.Supp. at 752), whereas the applicable amendments to the PLSRA did not become effective until December 22, 1995 (*see* 18 U.S.C. § 1964(c)). As such, Section 107 was not applicable to *Florida Dep't Ins.,* and the fact that the district court permitted a complaint to proceed that contained both securities fraud and civil RICO claims is of no matter.

Fourth, Plaintiffs argue that DuPont's criminal culpability should serve to lift the bar and allow all civil RICO claims to progress unmolested. However, Section 107's criminal conviction exception only applies to persons that have been criminally convicted in connection with the fraud, and DuPont has not been criminally convicted. *See, e.g., Krear v. Malek,* 961 F.Supp. 1065, 1076 (E.D.Mich.1997) ("[T]he exception is only available to those plaintiffs against whom a defendant has specifically been convicted of criminal fraud.").

Fifth, Plaintiffs argue that the act does not apply retroactively, and therefore does not apply to this cause of action, since the complaint is based, at least in part, on conduct that occurred before the December 22, 1995, effective date of the amendments to the PSLRA. This precise argument was addressed and rejected by the District Court, K. Michael Moore, J., in *Kolfenbach v. Mansour,* 36 F.Supp.2d 1351 (S.D.Fla.1999). In *Kolfenbach,* the plaintiff

filed a twelve-count complaint that attempted to predicate federal RICO violations on misconduct allegations that were also the subject of a federal securities fraud claim. Because the *Kolfenbach* complaint was filed on February 23, 1998, well after the effective date of the 1995 Reform Act, the defendants moved to dismiss the RICO claims based on the Section 107 bar. Plaintiff argued in response that application of § 1964(c) to bar his case would be an impermissible retroactive application of the statute because the alleged misconduct took place before the 1995 Reform Act took effect. The District Court applied the retroactivity analysis set forth by the United States Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483 (1994),[8] to find that the plaintiff's action was barred by the 1995 Reform Act. *Kolfenbach,* 36 F.Supp.2d at 1353-54. The District Court found that retroactive application of the 1995 Reform Act would not impair the plaintiff's rights, since, "[i]f there was ever a right embodied in a securities fraud-based civil RICO

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[8] The *Landgraf* Court stated:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

*Landgraf,* 511 U.S. at 280, 114 S.Ct. at 1505.

cause of action, it was only the right to pursue a claim that had already been filed *before* the 1995 Reform Act came into effect." *Id.* at 1354 (emphasis in original).

Plaintiffs have advanced two arguments in opposition to the application of *Kolfenbach* to this case. First, Plaintiffs attempt to distinguish *Kolfenbach,* arguing that Plaintiff-Growers in the case at bar have no remedy if their RICO claims are dismissed, whereas in *Kolfenbach* the Court noted that "the Plaintiff will not be left without a remedy." *Kolfenbach,* 36 F.Supp.2d at 1354 n. 13. This argument is unavailing, as the Plaintiff-Growers have pursued several other non-RICO remedies in this action. Second, Plaintiffs cite the Court to *Scott v. Boos,* 215 F.3d 940 (9th Cir.2000), and argue that the Court should follow the reasoning of the Ninth Circuit, which applied the *Landgraf* analysis to find that the 1995 Reform Act did have a retroactive effect and that the definitive acts for purposes of retroactivity under the PSLRA are the dates of the defendants' conduct. *Scott,* 215 F.3d at 950. Indeed, the Ninth Circuit did address the same issue as the District Court addressed in *Kolfenbach,* and it reached a dichotomous result. However, this Court finds the reasoning set forth in *Kolfenbach* to be persuasive, and holds that retroactive application of Section 107 of the 1995 Reform Act, codified at 18 U.S.C. § 1964(c), will not have a retroactive effect because the instant complaint was filed after the 1995 Reform Act became effective.

B. Count Twelve: Spoliation of Evidence

DuPont makes two arguments in support of dismissal of Count Twelve (Spoliation of Evidence): (1) the Florida Supreme Court has never recognized an independent tort

for spoliation of evidence and the modern trend of authority is to reject a separate spoliation tort, so this Court should find that it is likely that the Florida Supreme Court would reject the Plaintiffs' cause of action; and (2) even if Florida did recognize an independent tort for spoliation of evidence, Plaintiffs have not pled and cannot prove the elements of a spoliation claim. Because the Court finds that DuPont's second argument is persuasive and that the Plaintiffs failed to plead the elements of a spoliation claim, DuPont's first argument need not be addressed.

1. Elements of the Spoliation of Evidence Claim

Florida's intermediate appellate courts have recognized a separate tort of spoliation of evidence consisting of the following elements:

(1) the existence of a potential civil action;

(2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action;

(3) destruction of that evidence;

(4) significant impairment in the ability to prove the lawsuit;

(5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and

(6) damages.

*Florida Evergreen,* 135 F.Supp.2d at 1282 n. 7 (*citing Continental Ins. Co. v. Herman,* 576 So.2d 313, 315 (Fla. 3rd DCA 1990), *review denied by Herman v. Continental*

*Ins. Co.*, 598 So.2d 76 (Fla.1991)); *Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088, 1091 (Fla. 4th DCA 2001) (*citing Herman*, 576 So.2d at 315); *St. Mary's Hosp. v. Brinson*, 685 So.2d 33, 35 (Fla. 4th DCA 1996) (adopting *Herman's* characterization of the necessary elements for spoliation of evidence).

2. Relevant Allegations

Plaintiff-Growers assert that their spoliation claim encompasses the destruction of test plants involved in field trials DuPont conducted in Costa Rica (the "Costa Rica field trials") and the concealment of that conduct, as well as the concealment of analytical testing conducted by Alta Analytical Laboratories (the "Alta information"). DuPont argues in opposition that the only relevant allegation has to [sic] with destruction of plants during the Costa Rica field trials (*see* Pl. Compl. § 215), since 'concealment' of evidence is not actionable under Florida law. DuPont is correct.

As noted above, the elements of a spoliation of evidence claim in Florida include the "destruction" of evidence. Plaintiffs maintain in their opposition to DuPont's motion for judgment on the pleadings that "[c]oncealment is also spoliation." Pl. Opposition Memo. at 5. However, Plaintiffs rely exclusively on New Jersey law as it pertains to a New Jersey tort for "fraudulent concealment of evidence," *see id.* (*citing Rosenblit v. Zimmerman*, 166 A.2d 749, 758 (N.J.2001) and *Viviano v. CBS, Inc.*, 597 A.2d 543, 550 (N.J.Super.Ct.App.Div.1991)), whereas the applicable law is Florida law of spoliation of evidence.

Plaintiffs have not identified, and the Court is not aware of, any Florida courts that have recognized a spoliation

cause of action premised on "concealment," rather than "destruction," of evidence. *See, e.g., Aldrich v. Roche Biomedical Labs., Inc.,* 737 So.2d 1124 (Fla. 5th DCA 1999) ("Spoliation is defined as '[t]he intentional destruction of evidence and when it is established, fact finder may draw inference that evidence destroyed was unfavorable to party responsible for its spoliation. . . . The destruction, or the significant and meaningful alteration of a document or instrument.'") (citation omitted). In fact, such an action would be inconsistent with Florida law granting absolute immunity to all litigation conduct occurring in the course of a judicial proceeding. *See Florida Evergreen,* 135 F.Supp.2d at 1278-83.

Accordingly, the Court must determine whether a spoliation of evidence claim predicated on the assertion that DuPont secretly tested Benlate in Costa Rica and destroyed the test plants upon observing unfavorable results (*see* Pl. Compl. §§ 210-216) may state a viable claim for relief.

3. Impairment of Plaintiffs' Case

Florida courts recognize that a spoliation of evidence cause of action requires that the plaintiff "demonstrate that she was unable to prove her underlying action owing to the unavailability of the evidence." *Herman,* 576 So.2d at 315. In other words, the plaintiff must "suffer[ ] significant impairment in an ability to prove the underlying lawsuit." *Id.* While the question of whether an impairment is significant ordinarily presents a question of fact, it may be decided by the court as a matter of law where reasonable persons could not differ. *Id.* at 316. Spoliation actions typically involve the destruction of evidence that is absolutely

crucial to the action. *See, e.g., Miller v. Allstate Ins. Co.*, 573 So.2d 24 (Fla. 3rd DCA 1990) (products liability action against auto manufacturer in which auto manufacturer destroyed allegedly defective automobile); *Hagopian v. Publix Supermarkets, Inc.*, 2001 WL 686915 (Fla. 4th DCA 2001) (products liability action in which allegedly defective bottle was disposed of by defendant).

In this case, Plaintiffs' spoliation allegations are limited to the destruction of plants involved in the Costa Rica field tests. Plaintiffs do not allege any destruction of the product at issue in the Underlying Lawsuit, Benlate; nor do they allege the destruction of the Plaintiffs' plants, which formed the basis for the Underlying Lawsuit, or any other essential evidence. At best, the Costa Rica field test plants could have been used to show relevant similar fact evidence, which would have been cumulative of the evidence already available to the Plaintiffs. Thus, no reasonable person could find that the destruction of the Costa Rica field test plants "significantly impaired" or otherwise rendered the Plaintiffs "unable to prove" their underlying case, as is required of a spoliation claim pursuant to Florida law. *See Herman,* 576 So.2d at 315.

4. Causation

Not only have Plaintiffs failed, as a matter of law, to allege facts that would show the required degree of impairment, they have also failed to allege the required causal link between the destruction of the Costa Rica field test plants and their alleged damages.

Plaintiffs' allegations place the cause of their damage (the agreement to settle their cases for amounts far below the settlement value that would have been reasonable

otherwise) on DuPont's fraudulent concealment of the Costa Rica test and the documents and evidence associated with it. *See* Compl. §§ 224, 225. Accordingly, it cannot be found, as a matter of law, that the fifth element of a spoliation of evidence claim ("a causal relationship between the evidence destruction and the inability to prove the lawsuit") can be established. As set forth in *Florida Evergreen,* DuPont's alleged concealment during the Underlying Lawsuit is immune litigation conduct, and is not actionable. *See Florida Evergreen,* 135 F.Supp.2d at 1278-83. Plaintiffs' damages must show that the actual destruction of the Costa Rica field test plants, not the concealment of evidence revealing the test results on those plants, led to their inability to prove their lawsuit. They have not set forth the ability to do so in this case; judgment in favor of DuPont is therefore warranted.

C. Motion to Amend the First Amended Complaint

Plaintiff-Growers night-box filed a Motion to Amend [D.E. 323] on August 1, 2001, two days prior to the scheduled oral argument on DuPont's motions for judgment on the pleadings. The motion to amend seeks leave of Court, pursuant to Fed.R.Civ.P. 15, to amend the First Amended Complaint in all eighteen of the consolidated Plaintiff-Grower cases to: (a) consolidate the factual allegations, (b) add two causes of action alleging that DuPont has violated the Florida Civil Remedies for Criminal Practices Act ("Florida RICO"), Chapter 772 Florida Statutes, and (c) eliminate claims for Infliction of Emotional Distress, Interference with Prospective Economic Advantage, and Violation of Florida Deceptive and Unfair Trade Practices Act (Counts Ten, Eleven, and Thirteen of the First

Amended Complaint). Plaintiffs have stated in their motion that virtually identical Second Amended Complaints will be filed in Hawaii.

Federal Rule of Civil Procedure 15 provides, in pertinent part, that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Although "[l]eave to amend shall be freely given when justice so requires," a motion to amend may be denied on "numerous grounds" such as "undue delay, undue prejudice to the defendants, and futility of the amendment." *Abramson v. Gonzalez,* 949 F.2d 1567, 1581 (11th Cir.1992). Furthermore, under Fed.R.Civ.P. 15(c)(2), amendments of pleadings relate back to the date of the original pleading when the claim asserted in the amended pleading arises out of the same conduct, transaction, or occurrence set forth in the original pleading. *See* Fed.R.Civ.P. 15(c)(2).

Despite the liberal amendment provisions of Rule 15, it is inappropriate to grant Plaintiff-Growers' motion for leave to amend in this case.

When the Eleventh Circuit Court of Appeals granted interlocutory review of this Court's March 8, 2001 Order on DuPont's motions for judgment on the pleadings based on litigation conduct and reasonable reliance, it divested this Court of jurisdiction to consider the motion to amend the complaint in Case No. 98-2256-Civ-Gold. "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.,* 459 U.S. 56, 58, 103 S.Ct. 400, 401 (1982). Other

federal courts that have addressed this issue typically disallow motions to amend a complaint at the district court level after a court of appeals accepts jurisdiction over an interlocutory appeal. *See, e.g., May v. Sheahan,* 226 F.3d 876, 878 (7th Cir.2000) ("As a general matter, a notice of appeal 'divests the district court of its control over those aspects of the case involved in the appeal,' [such that] the district court retains jurisdiction to act only if the order being appealed or the proceeding before the district court is a discrete matter ancillary to the issues under consideration in the other court.") (citations omitted); *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.,* 906 F.2d 1059, 1063 (5th Cir.1990) ("When one aspect of a case is before the appellate court on interlocutory review, the district court is divested of jurisdiction over that aspect of the case. A district court does not have the power to 'alter the status of the case as it rests before the Court of Appeals.'") (citations omitted); *see also Hernandez v. Coughlin,* 18 F.3d 133, 138 (2nd Cir.1994) (once the plaintiff filed a notice of appeal of the order dismissing his case, jurisdiction was transferred to the Court of Appeals, and a "subsequent motion to file an amended complaint was therefore precluded because the district court was without jurisdiction to permit the amendment"). The proposed amendments seek to revise the factual allegations of the Complaint, delete certain claims that this Court has already ruled upon in the March 8, 2001 Order and which are now before the Eleventh Circuit Court of Appeals, and seeks to add new Florida RICO claims. Thus, permitting Plaintiffs to file a second amended complaint at this time would directly impact the issues on appeal, and the motion to amend in Case No. 98-2256-Civ-Gold must be disallowed.

Furthermore, despite the fact that the motions for judgment on the pleadings were case-specific, that this Court's current Order and March 8, 2001 Order were issued in Case No. 98-2256-Civ-Gold, and that the interlocutory appeal currently pending before the Eleventh Circuit Court of Appeals technically only involves Case No. 98-2256, the Court's previous 1292(b) certification recognizes that these rulings will seriously impact the disposition of the remaining 33 consolidated Benlate cases. Thus, as a practical matter, it does not make sense to permit the second amended complaint at this time. Permitting the Plaintiff-Growers to amend the complaints in the consolidated Benlate cases while denying the amendments in the lead case that is currently undergoing interlocutory review would unnecessarily confuse the issues in this litigation and waste judicial resources. The motion to amend is therefore denied in Case No. 98-2256-Civ-Gold for lack of jurisdiction and denied without prejudice at this time in the remaining consolidated Benlate cases pending further direction from the Eleventh Circuit Court of Appeals.

## IV. Conclusion

DuPont's motions for judgment on the pleadings as to Plaintiffs' RICO claims and as to Plaintiffs' spoliation claim are granted, and Plaintiff-Growers' motion to amend is denied without prejudice at this time. In combination with the Court's May 8, 2001 Order, all of the counts in Plaintiffs' First Amended Complaint in Case No. 98-2256-Civ-Gold are dismissed and judgment on the pleadings is awarded in favor of DuPont and against the Plaintiffs. Thus, this order constitutes a final decision in Case No. 98-2256-Civ-Gold, and it is subject to appeal pursuant to 28 U.S.C. § 1291.

Wherefore, it is

ORDERED AND ADJUDGED that DuPont's Motion for Judgment on the Pleadings As to Plaintiffs' RICO Claims, filed on May 9, 2001, is GRANTED. Counts Six and Seven of the First Amended Complaint are dismissed, and judgment is awarded in favor of DuPont on those counts. It is further

ORDERED AND ADJUDGED that DuPont's Motion for Judgment on the Pleadings As to Plaintiffs' Spoliation Claim, filed on May 9, 2001, is GRANTED. Count Twelve of the First Amended Complaint is dismissed, and judgment is awarded in favor of DuPont on that count. It is further

ORDERED AND ADJUDGED that Plaintiff-Growers' Motion to Amend their First Amended Complaint, filed on August 1, 2001, is denied in Case No. 98-2256-Civ-Gold for lack of jurisdiction and denied without prejudice in the remaining consolidated Benlate cases. It is further

ORDERED AND ADJUDGED that resolution of DuPont's Motion to Consolidate Cases for Common Issues Trial, filed on October 10, 2000, is deferred pending a ruling by the Eleventh Circuit Court of Appeals on the Plaintiff's interlocutory appeal of the Court's orders on DuPont's motions for judgment on the pleadings. The Clerk of Court shall remove the motion from the pending motions list at this time, and the Court will reconsider the motion to consolidate for common issues trial upon motion of the parties.

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 01-13345 & 01-15693-JJ

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GREEN LEAF NURSERY,
GUS PENA,

Plaintiffs-Counter-
Defendants-Appellants,

versus

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware Corporation,

Defendant-Counter-
Claimant-Appellee.

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On Appeal from the United States District Court
for the Southern District of Florida

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(Filed Oct. 20, 2003)

*ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC*
(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: BIRCH, DUBINA and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

18 U.S.C. § 1964(c), in relevant part, provides:

> Any person injured in his business or property by reason of violation of [RICO] . . . may sue . . . in any appropriate United States district court. . . .

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18 U.S.C. § 1961, in relevant part, provides:

> (1) "racketeering activity" means . . . (B) any act . . . under . . . title 18, . . . United States Code . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . .

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18 U.S.C. § 1341, in relevant part, provides:

> Whoever having devised . . . any scheme . . . to defraud . . . for the purpose of executing such scheme . . . places in any post office . . . any matter . . . to be . . . delivered by Postal Service . . . shall be fined . . . or imprisoned. . . .

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18 U.S.C. § 1343, in relevant part, provides:

> Whoever having devised . . . any scheme . . . to defraud . . . transmits or causes to be transmitted by means of wire . . . in interstate or foreign commerce, any writings, . . . or sounds for the purpose of executing such scheme . . . shall be fined . . . or imprisoned. . . .

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18 U.S.C. § 1503, in relevant part, provides:

> Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished. . . .

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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|---|---|
| GREEN LEAF NURSERY, INC. and GUS PENA,<br>Plaintiffs,<br>vs.<br>E.I. DUPONT DE NEMOURS AND COMPANY,<br>a Delaware corporation,<br>Defendant. | CASE NO.<br>98-2256-CIV-GOLD<br>Magistrate Judge Dube<br>**FIRST AMENDED COMPLAINT**<br>(Jury Trial Demanded) |

FIRST AMENDED COMPLAINT FOR FRAUD, RACKETEERING, CONSPIRACY, MISREPRESENTATION, ABUSE OR PROCESS, INFLICTION OF EMOTIONAL DISTRESS, INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE, NEGLIGENCE, SPOLIATION OF EVIDENCE and PUNITIVE DAMAGES

Plaintiffs allege against Defendants, jointly and severally, as follows:

## INTRODUCTION

(Filed October 22, 1998)

1. This is a fraud case. It is brought by a Florida nurseryman and his business, in connection with a continuing scheme – devised, conducted, and/or participated in by Defendant E.I. du PONT de NEMOURS AND COMPANY (hereinafter DUPONT), and others, to defraud those who suffered damages as a result of using DUPONT's product, Benlate. Defendant engaged in a pattern of racketeering activity, and conspired to wrongfully and

unlawfully prevent Benlate claimants, such as the Plaintiffs herein, from learning the true facts, and thereby cause Benlate claimants, such as the Plaintiffs herein, to settle their Benlate claims for less than their true value, all to the detriment of the Plaintiffs.

2. DUPONT's racketeering scheme particularly impacted the Plaintiffs because their attorneys at Sheehe, Vendittelli, Levine, Cunningham & Doyle (hereinafter "Sheehe Vendittelli") were handling their case along with many others, and were in contact with other Benlate plaintiffs' lawyers around the country and were monitoring other Benlate litigation in order to gain information. DUPONT knew of the involvement of plaintiffs' lawyers like Sheehe Vendittelli in other Benlate case, and therefore discovery produced by DUPONT in other cases other than Plaintiffs' case would have benefitted the Plaintiff [sic].

3. To effectuate this scheme, Defendant engaged in a pattern of racketeering activity violating Title IX of The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, Racketeer Influenced and Corrupt Organizations ("RICO"). It violated civil duties and criminal statutes as part of a nationwide scheme to defraud persons and businesses injured by Benlate.

4. Defendant employed such scheme, *inter alia*, in 1992 and 1993 in the *Bush Ranch* litigation (*Bush Ranch v. DUPONT*, No. 92-33-COL, United States District Court for the Middle District of Georgia, Columbus Division) before Judge J. Robert Elliott.

5. The fraudulent scheme was effectuated in part by knowingly using perjured, false and fraudulent testimony and affidavits to perpetrate fraud on the courts and plaintiffs involved in Benlate litigation, including Plaintiffs herein;

making false statements themselves to plaintiffs, juries, courts and the public; intentionally violating court discovery orders; intentionally and illegally concealing critical damaging evidence; intentionally misrepresenting the privileged status of documents to courts and plaintiffs; and intimidating witnesses adverse to DUPONT's position. These acts commenced on or before September 1991 and continue to the present, for the purpose of defeating or diminishing the claims of Benlate claimants, including Plaintiffs. This conduct was implemented by mail fraud (18 U.S.C. Section 1341), wire fraud (18 U.S.C. Section 1343), witness tampering (18 U.S.C. Section 1512), and obstruction of justice (18 U.S.C. Section 1503) in numerous Benlate cases.

6. In deciding that DUPONT and its attorneys, had committed discovery abuses unprecedented in the annals of American jurisprudence, Judge Elliott specifically stated: "Put in layperson's terms, DUPONT cheated. And it cheated consciously, deliberately and with purpose. DUPONT has committed a fraud on this Court . . . ". Opinion and Order, filed August 21, 1995, p. 73, *Bush Ranch v. DUPONT*, No. 92-33-COL, United States District Court for the Middle District of Georgia, Columbus Division; attached hereto as Exhibit "A".

7. Judge Elliott found that DUPONT and its lawyers had made the *Bush Ranch* trial "a farce". *Id.*

8. In a related Benlate case, bearing upon the same issues, Judge Ronald Ibarra of the Third Circuit Court, State of Hawaii, found as a fact " . . . that DUPONT engaged in fraud and intentional misconduct which abused the judicial process. DUPONT acted in bad faith, wantonly and for oppressive reasons." Findings of Fact

and Conclusions of Law, filed August 22, 1996, p.48, *Kawamata v. United Agri Products et al.*, Civil No. 91-437, Circuit Court of the Third Circuit, State of Hawaii, attached hereto as Exhibit "B".

9. The unprecedented nature of DUPONT's fraud was set out in stark terms by the Hawaii Supreme Court in its decision upholding Judge Ibarra's decision to sanction DUPONT for its conduct even though the *Kawamata/Tomono* plaintiffs prevailed at trial. In fact, DUPONT's conduct was so egregious that the Hawaii Supreme Court created new precedent so as to affirm Judge Ibarra's punishment of DUPONT:

> In this case, considering the egregious nature of the fraud by DuPont, we construe the HRCP so as not to disallow a remedy under HRCP Rule 60(b)(3) when there is a post-judgment discovery of fraud supported by clear and convincing evidence. This interpretation of HRCP 60(b)(3) departs from federal case law and sets a new precedent. However, the instant case presented an unusual, unique example of unprecedented discovery fraud perpetuated against the court. As a matter of equity, it would be unfair to allow DuPont to escape accountability for its fraud, misrepresentation, and misconduct, simply by virtue of the fact that the Plaintiffs had the good fortune to somehow overcome DuPont's discovery fraud and obtain a favorable jury verdict.

10. In defaulting DUPONT for extreme misconduct in *Davis Tree Farms Inc. et al., v. DUPONT, et al.*, another Benlate case which was consolidated with Plaintiffs' products liability case for discovery, Florida Circuit Court Judge Amy Donner found as a fact that " ... DUPONT's destruction of evidence and refusal to comply with discovery

requests to prove same, irreparably harmed plaintiffs in this matter, and demonstrates their complete disregard for the canons of ethics and the rules of discovery". *Davis Tree Farms, Inc., v. DUPONT*, Case No. 92-20006, Circuit Court, Dade County, Florida, (CA.23) at p.11. (After the Order became public, the *Davis Tree Farms* case and other cases involving the same attorneys settled, and in connection with the settlement, Judge Donner vacated and sealed this Order).

11. These orders spell out some of DUPONT's deliberate withholding and/or destruction of evidence, deliberate false statements about that evidence by DUPONT and its lawyers, gross abuse of the discovery process, and use of perjured testimony regarding that evidence. All this was done for the purpose and with the intent of defrauding Plaintiffs and the courts, and depriving Plaintiffs of their right to recover fair compensation for the harm they had sustained due to Benlate. As a result of the continuing cover up, the fraud referred to herein was discovered by Plaintiffs herein only recently, within the past four (4) years.

12. This Complaint also alleges common law claims under the laws of the State of Florida for: (i) fraud by Defendant on the Plaintiffs, (ii) Intentional Nondisclosure of Material Fact, (iii) Fraudulent Inducement to Settle, (iv) Fraud on the Court, (v) Recission and Damages for Fraud, (vi) RICO, (vii) Conspiracy to violate RICO, (viii) Conspiracy, (ix) infliction of emotional distress, (x) interference with prospective economic advantage, (xi) abuse of process for the use of legal processes, including discovery tools, testimony and legal briefs, for improper and ulterior purposes, (xii) spoliation of evidence, and (xii) [sic] Florida Deceptive and Unfair Trade Practices.

13. The relief sought includes compensatory damages, punitive damages and treble damages arising from the scheme to defraud as set forth herein, equitable relief estopping DUPONT from asserting the releases and orders procured by fraud and/or misrepresentation, or alternatively, such other equitable relief as is deemed appropriate by the Court, prejudgment interest, costs of investigation and suit, and attorney's fees.

## JURISDICTION

14. The jurisdiction of this Court over the subject matter of this action is predicated on 18 U.S.C. Section 1964 and 28 U.S.C. Sections 1331 and 1367. In addition, this Court has original jurisdiction under 28 U.S.C. Section 1332, in that it is a civil action between citizens of different states in which the matter in controversy exceeds $75,000.00, exclusive of interest and costs.

## VENUE

15. Venue is proper in this District in that the Defendant is subject to personal jurisdiction in this District at the time the action is commenced, a substantial part of the events giving rise to the claims occurred in this District, the Defendant has transacted its business and affairs in this District, and the Defendant has committed tortious acts in this District.

## THE PARTIES

16. Plaintiffs are and were at all times mentioned herein citizens and residents of the State of Florida with their principal places of business in the State of Florida.

17. E.I. du PONT de NEMOURS AND COMPANY ("DUPONT") is a Delaware Corporation with its principal place of business in the State of Delaware. DUPONT manufactures and distributes various pesticides for personal and professional use, including fungicides. DUPONT distributes its products in all 50 states of the United States, and around the world.

18. The individuals in Paragraphs 19-41 below are non-parties who are identified alphabetically here for convenient reference.

19. NICHOLAS ALBERGO, a co-conspirator and joint venturer with, and an agent of, DUPONT and ALSTON & BIRD, is an environmental engineer from Tampa, Florida, who testified falsely as an expert witness for DUPONT in *Bush Ranch*.

20. ALSTON & BIRD is a Georgia Partnership Including Professional Corporations, with its principal place of business in the State of Georgia. ALSTON & BIRD served as counsel for DUPONT in several law suits stemming from allegations concerning DUPONT's fungicide, Benlate DF 50, including lawsuits in Florida.

21. ALTA LABS is an analytical chemistry facility in El Dorado Hills, California hired by DUPONT to conduct soil and water analysis for sulfonylureas ("SU's"; described *infra*) in Benlate claimants' soils and waters.

22. GLEN S. BALDWIN is an attorney, and Senior Counsel for DUPONT in Wilmington, Delaware.

23. ROBERT BETHEM is the master chemist at ALTA Labs and is the person primarily responsible for the SU testing conducted at ALTA Labs on Benlate claimants soils and water.

24. MORRIS A. BAILEY is a research scientist for DUPONT in Wilmington, Delaware. He is a member of the Benlate Resolution Team.

25. THOMAS A. BURKE is an attorney, and a partner at CABANISS BURKE & WAGNER in Orlando, Florida. Mr. BURKE served at relevant times as DUPONT's national coordinating counsel for its Benlate litigation.

26. RICHARD CEFALO is an employee of WELKER PLANTS, INC., and was hired by DUPONT to conduct the Costa Rica field test.

27. CROWELL & MORING is a Washington D.C. law firm that was hired by DUPONT as its national coordinating counsel. Its lawyers have also been lead counsel in certain Benlate cases.

28. TODD R. DAVID is an attorney and partner at ALSTON & BIRD, Mr. DAVID was one of the attorneys representing DUPONT in *Bush Ranch*.

29. GEORGE A. FRANK is an attorney, and Corporate Counsel for DUPONT in Wilmington, Delaware.

30. RICHARD T. FULTON is an attorney and partner at ALSTON & BIRD. Mr. FULTON was one of the attorneys representing DUPONT in *Bush Ranch* [sic]

31. J. ROBERT GIBSON is a DUPONT Agricultural Products Division Executive.

32. ELIZABETH A. GILLEY is an attorney and partner at ALSTON & BIRD. Ms. GILLEY was one of the attorneys representing DUPONT in *Bush Ranch*.

33. BRUCE A. HADLEY is a research manager at DUPONT. Since 1991, Dr. HADLEY has been on special assignment responsible for investigations into Benlate, and a member of the Benlate Resolution Team.

34. DAVID JOHNSON is a DUPONT analytical chemist who, *inter alia*, provided four to six months of training on analytical chemistry issues to the ALSTON & BIRD attorneys who were involved in the defense of DUPONT in *Bush Ranch*.

35. WILLIAM KIRK is a DUPONT Executive.

36. DOW N. KIRKPATRICK, II, is an attorney, and a partner at ALSTON & BIRD. Mr. KIRKPATRICK was the lead trial attorney for DUPONT in *Bush Ranch*.

37. J. KENNARD NEAL is an attorney, and Of Counsel to ALSTON & BIRD, Mr. NEAL was one of the attorneys for DUPONT in *Bush Ranch*.

38. TIMOTHY R. OBRIGAWITCH is the Research Field Operations Supervisor for DUPONT.

39. ROBERT PETERSON is an employee at ALTA Labs who worked with Robert BETHEM on Benlate claimant soil and water analysis.

40. POPE, MCGLAMRY, KILPATRICK & MORRISON is the law firm which represented Plaintiffs in *Bush Ranch*.

41. GERALD STEPHENSON is a DUPONT employee involved in the Costa Rica field test.

42. LEON VARGAS is a chemist hired by DUPONT in connection with the Costa Rica field test.

43. EDGAR S. WOOLARD, JR., is the former president and CEO of DUPONT.

44. At all relevant times, NICHOLAS ALBERGO, ALSTON & BIRD, ALTA LABS, GLEN S. BALDWIN, ROBERT BETHEM, MORRIS A. BAILEY, THOMAS A. BURKE, CROWELL & MORING, TODD R. DAVID, GEORGE A. FRANK, J. ROBERT GIBSON, ELIZABETH A. GILLEY, BRUCE A. HADLEY, DAVID JOHNSON, WILLIAM KIRK, DOW N. KIRKPATRICK, J. KENNARD NEAL, TIMOTHY R. OBRIGAWITCH, ROBERT PETERSON, GERALD STEPHENSON, and EDGAR S. WOOLARD, JR. were DUPONT's agents and joint venturers acting within the course and scope of their agency or joint venture, and each of their acts and omissions were authorized by DUPONT and ratified by DUPONT. The above individuals were also DUPONT'S co-conspirators.

## FACTS COMMON TO ALL CLAIMS

45. This action arises in part out of the successful efforts of Defendant DUPONT to defraud Benlate claimants, including Plaintiffs herein, during litigation which took place throughout the United States, including in [sic] the State of Florida. Specifically, the improper conduct of this Defendant centers around the illegal withholding of vital scientific data and information generated by: 1) these Defendant's agent, ALTA Laboratories, 2) DUPONT itself, and 3) other agents of DUPONT. The data was central to Plaintiffs' claims. It was data that was required to be turned over to Plaintiffs through their counsel or other Benlate claimants (which would have been shared with Plaintiffs' lawyers at Sheehe Vendittelli) but was wrongfully, illegally, and fraudulently withheld. The withholding of this

data was part of a fraudulent scheme to diminish or extinguish DUPONT's legal liability for damages suffered by these Plaintiffs and thousands of nurserymen like them as a result of a defective, contaminated fungicide called Benlate which DUPONT manufactured and sold. These multiple acts of fraud and deception are in part chronicled in orders issued by Judge Elliott of the Federal District Court in Columbus, Georgia, and Judge Ibarra of the Circuit Court for the Third Circuit, State of Hawaii, in which these two Courts found as a fact that DUPONT perpetrated fraud in numerous ways upon their respective courts and the plaintiffs therein, as well as other Benlate claimants including Plaintiffs herein, directly and by implication. True and correct copies of said orders are attached hereto as Exhibits "A" and "B".

46. The Plaintiffs filed products liability lawsuits against DUPONT in 1992. On or about March 13, 1993, Plaintiffs' lawsuit was consolidated with eleven (11) other such actions for discovery. In or about November, 1993, Plaintiffs' action along with five (5) other cases went to trial in the Eleventh Circuit Court for the State of Florida (Dade County). Trial of these cases lasted several months until April, 1994, when Plaintiffs and DUPONT reached a settlement of Plaintiffs' claims while the jury was deliberating. On or about May 11, 1994, the Court ordered the verdict in the matter sealed as the parties had agreed to settle Plaintiffs' claims.

47. The instant Plaintiffs' products liability cases against DUPONT were, as a result of the fraud by Defendant, circumstantial. Their special damages claims were substantial and they were fraudulently induced to settle for a small fraction of what would have otherwise been a reasonable settlement value, giving up entirely their

claims for, *inter alia*, punitive damages. These plaintiffs have each been damaged in amounts exceeding the jurisdictional limits of this honorable court.

48. Had they known that DUPONT itself and its agents had: (1) proof of deadly SU's in Benlate claimants' soils; (2) massive proof of deadly contaminants in the Benlate itself; and (3) proof from DUPONT's own field tests that Benlate harmed and killed plants, their entire case would have been different, would have been in a much more favorable posture for plaintiffs and would have resulted in a more favorable settlement or judgment for plaintiffs.

49. The following findings of Judge Elliott are accurate: (1) the SU evidence "would have been devastating to the Defendant's case had it been shown that its own experts at ALTA Labs had reached an opposite finding that there *were* SU's present." The ALTA's test results showed just that. Exhibit "A", pp.17-18; (2) the ALTA evidence would have been "particularly grave" for DUPONT. Exhibit "A", p.20; (3) had the ALTA documents been produced . . . "The trial of the case may have been materially altered. The presentation of Plaintiffs' witnesses, the cross-examination of Defendant's witnesses, Plaintiffs rebuttal case, opening statements and closing arguments, at the very least would have been entirely different. Exhibit "A", p.22; (4) "DUPONT's conduct affected the course of *Bush Ranch* trial from beginning to end – from opening statement to closing argument." Exhibit "A", p.73.

50. Defendant's concealment and fraudulent conduct, which had commenced on or before September 1991, continues to the present. The continuing nature of DUPONT's

concealment has deprived plaintiffs of the opportunity promptly to seek appropriate redress for damage that has been done to them. Plaintiffs have lost the use of the money they deserved as compensation for their loss, and because of that their businesses and they individually continued to be harmed and, in addition, the contamination at their farms could not be cleaned up.

51. Being defrauded has caused Plaintiffs severe emotional distress and has resulted in literally years of additional effort on their parts in seeking justice.

## THE BUSH RANCH LITIGATION

52. The *Bush Ranch* litigation concerned claims that Benlate 50 DF, a fungicide manufactured by DUPONT, harmed or destroyed plants grown by nurserymen in their businesses, and that Benlate or contaminants present in Benlate had contaminated soil, media, equipment, and structures used by them in their businesses, causing substantial economic damages past and future. The *Bush Ranch* plaintiffs retained POPE, McGLAMRY, KILPATRICK & MORRISON ("POPE, McGLAMRY") to represent them in lawsuits against DUPONT, seeking damages for the injuries suffered by them and their businesses.

53. On behalf of the *Bush Ranch* plaintiffs, POPE, McGLAMRY filed suit in the Middle District of Georgia against DUPONT in 1992. These actions were styled *Bush Ranch v. DUPONT*, No. 92-33-COL, United States District Court for the Middle District of Georgia, Columbus Division. In July 1993, the *Bush Ranch* case became the first Benlate case to go to trial anywhere in the United States; the first of what was anticipated to be hundreds of such

trials. Because it was the first, and because there were so many others, the *Bush Ranch* trial was particularly important to DUPONT.

54. Representatives of the Plaintiffs, including attorneys working with Sheehe Vendittelli, were in communication with the *Bush Ranch* plaintiffs' counsel regarding discovery in those cases and attended the *Bush Ranch* trial. Robert McKee attended the Bush Ranch trial and observed the proceedings for Kevin Malone, a Ft. Lauderdale attorney who represented over 200 Benlate claimants. In November, 1993, Mr. Malone and Mr. McKee joined on as co-counsel for Plaintiffs herein, and assisted Sheehe Vendittelli in the trial of Plaintiffs' case. Thus, information in the *Bush Ranch* trial would have been in the matter of course known to Plaintiffs' lawyers, and could have been used in Plaintiffs' trial.

55. The Plaintiffs specifically relied upon the evidence DUPONT produced in the *Bush Ranch* trial. In particular, the Plaintiffs specifically relied upon having access to and/or learning of all evidence produced by DUPONT relating to Benlate 50 DF contamination, field tests using Benlate, and evidence relating to tests for contaminants, including SUs, found in soils after Benlate application.

## THE ALTA LABS DATA

56. One of Plaintiffs' primary theories of liability was that Benlate had been contaminated with extremely potent herbicides (also manufactured by DUPONT) known as sulfonylureas (SU's). Plaintiffs alleged that Benlate was contaminated with these herbicides at a plant in Belle, West Virginia where both the active ingredient of Benlate

(benomyl) and the SU's were formulated and/or stored. DUPONT vigorously denied that this had occurred, and in fact took the false position that it was impossible.

57. In its trial brief filed in Plaintiffs' products liability case, DUPONT argued the same thing. It stated that "DuPont's scientists . . . performed state-of-the-art chemical analyses of . . . soil samples taken from sites alleging plant damage. These analyses proved that Benlate® DF did not contain any sulfonylurea or other ALS inhibiting herbicides . . . " This statement was false and was intended to mislead the Plaintiffs herein, and the Court.

58. For DUPONT, concealing the positive SU findings in the *Bush Ranch* plaintiffs soil and water, as discussed below, was particularly critical because SU contamination not only established liability; it also explained the continuing harm to the nurseries and dramatically increased their future damages.

59. As part of their discovery in *Bush Ranch*, the plaintiffs served document production requests on DUPONT, specifically including all documents relating to mass spectrometry testing or analysis relating to the use of Benlate 50 DF. The *Bush Ranch* Plaintiffs' 1st Request for Production of Documents #18 (served on March 4, 1992) requested the production of: "All documents reflecting, referencing, and/or relating to any analytical findings (including the identification of peaks) from mass spectrometry, infrared spectrometry, ultraviolet spectrometry, gas chromatography, column chromatography, gas-liquid chromatography, thin-layer chromatography, high performance liquid chromatography, and/or affinity chromatography

in any way relating to the use and/or administration of Benlate 50 DF . . . "

60. Request #65 (also served March 4, 1992) requested the production of: " . . . all documents relating to and/or referencing any report or finding from any person, or entity, whether or not employed by defendant, of other pesticidal compounds, including but not limited to, herbicides, in Benlate 50 DF or any other benomyl-containing fungicide."

61. DUPONT, through ALSTON & BIRD, resisted Plaintiffs' attempts to discover this information, filing objections to the aforementioned requests. Judge Elliott ordered DUPONT to produce the aforementioned documents.

62. By Order dated June 24, 1992, Judge Elliott overruled DUPONT's objections to the Requests for Production of Documents, ordered DUPONT to review its responses to Plaintiffs' requests for production " . . . and to fully answer each of Plaintiffs' first requests for production of documents within fifteen days from the date of this order."

63. In that same Order, the Court ruled explicitly that in connection with the consolidated discovery, and DUPONT's supplemental responses to it, DUPONT must provide all documents or copies of documents received by or contained in the files of any and all of its retained or employed experts, consultants, attorneys, insurance carriers, and insurance adjusters, in addition to documents in DUPONT's own files. In that same Order, the Court specifically overruled DUPONT's objections to producing documents involving Benlate claims, lawsuits and tests DUPONT had conducted since March 1991, with

only DUPONT's claims of attorney-client privilege and work product protection remaining for consideration by the Court. The Court ordered DUPONT to document any claim of privilege or work product protection in a detailed log to be submitted to the Court by DUPONT.

64. By formal request pursuant to the Federal Rules of Civil Procedure, on or about May 24, 1993, all *Bush Ranch* plaintiffs requested the supplementation of DUPONT's previous responses to Plaintiffs' First Request for Production of Documents. DUPONT formally responded to said request for supplementation on or about June 30, 1993. The ALTA documents described below were responsive to this request but were not produced or referenced, despite the Court's previous orders.

65. In an effort purportedly to ascertain whether SU's, the alleged contaminants, were present in soil, media, and water used by the *Bush Ranch* plaintiffs, (which Plaintiffs were alleging was causing Plaintiffs' damages), DUPONT sought to obtain soil, water and plant tissue samples from the properties of the *Bush Ranch* plaintiffs. Plaintiffs objected to DUPONT's request to enter upon their land, and refused to permit it unless DUPONT agreed to turn over to Plaintiffs' counsel, *inter alia*, all documents and raw data generated as a result of the testing and analysis to be performed by DUPONT and/or its agents. (Documents required to be turned over in any event. See above.) Only after, and because, DUPONT, through ALSTON & BIRD, agreed on May 28, 1993, to turn over the aforesaid material to Plaintiffs' counsel (so long as the material was not protected from disclosure by the attorney-client privilege or the work product rule) did Plaintiffs consent to DUPONT's entry upon their land and the removal for testing of their soil, media, and/or water.

66. DUPONT hired Nicholas Albergo to collect the samples from Plaintiffs' properties, and to forward the samples to ALTA Labs for testing for the presence of SU's.

67. In June 1993, Mr. ALBERGO collected the samples from sites utilized by *Bush Ranch* plaintiffs, pursuant to the agreement made on May 28, 1993. ALBERGO, on instruction from ALSTON & BIRD, sent these soil samples to ALTA Labs of El Dorado Hills, California, for analysis. On information and belief, ALTA Labs was the only, or one of only two, facilities in the United States with the equipment and expertise to conduct the sophisticated tests required to detect SU's in parts per trillion in the soil samples. These tests were done by a Liquid Chromatography/Mass Spectrometry/Mass Spectrometry or LC/MS/MS instrument at ALTA LABS.

68. Between June 18 and June 26, 1993, ALTA Labs conducted LC/MS/MS analysis of the soil and water samples collected by ALBERGO with ALSTON & BIRD. Initial analyses showed that the samples taken from the properties of the *Bush Ranch* plaintiffs were producing positive findings for the presence of SU's manufactured by DUPONT. Samples taken from the *Bush Ranch* plaintiffs' properties were showing positive findings of nine SU's manufactured by DUPONT, in amounts as high as 595 parts per trillion. These showings would clearly demonstrate contamination of Benlate and its harmful effects on plants inasmuch as no *Bush Ranch* plaintiff had used SU's.

69. Robert Bethem and/or Robert Peterson of ALTA Labs communicated this data to attorneys at ALSTON & BIRD, including Ms. GILLEY, Mr. DAVID and Mr. NEAL, in a

telephone conversation or conversations between California and Georgia between June 19 and June 26, 1993, and in summary table documents transmitted via facsimile from California to Georgia between June 19 and June 26, 1993. All participants in the conversation understood that the positive SU findings had the potential to be devastating evidence against DUPONT.

70. These documents, and ALTA raw data (hundreds of chromatographs and quantitation sheets) generated by ALTA Labs during June 1993, including notes of the telephone conversation(s) referred to above, were documents responsive to Plaintiffs' requests for production #18 and/or #65 set forth above.

71. DUPONT and ALSTON & BIRD knew of the existence of the documents transmitted via facsimile from ALTA to ALSTON & BIRD referred to above, and DUPONT and ALSTON & BIRD knew or should have known of the existence of other documents at ALTA Labs responsive to requests #18 and #65.

72. Notwithstanding this knowledge, in its June 30, 1993 response to the *Bush Ranch* Plaintiffs' request for supplementation, DUPONT deliberately and intentionally did not produce or offer to produce to plaintiffs any of the aforementioned documents generated by ALTA Labs. This conduct violated 18 U.S.C. Section 1503, the Federal Rules of Civil Procedure, the Court's Orders referred to above and DUPONT's May 28, 1993 agreement.

73. Nor did DUPONT notify Plaintiffs or the Court that it was withholding said documents based on a claim that said documents were protected from disclosure either by the attorney-client privilege or the work product rule (also referred to as the work product privilege). The Court

had ordered DUPONT to notify it and Plaintiffs whenever either such privilege was claimed and to submit a privilege log so the Court could decide whether the privilege claim was correct.

74. DUPONT did not submit a privilege log to the Court identifying any of the ALTA documents as privileged.

75. Nor did DUPONT move the Court to reconsider its June 24, 1992 Order compelling complete responses to plaintiffs' requests #18 and #65, including any documents in the possession of DUPONT's attorneys, consultants, and expert witnesses.

76. ALSTON & BIRD and DUPONT understood that ALTA data evidencing the presence of SU's in the *Bush Ranch* Plaintiffs' soils would strengthen the value of their claims against DUPONT and the value of other Benlate claimants' claims, including Plaintiffs herein, would be increased as well.

77. Dr. David JOHNSON, a DUPONT analytical chemist, provided four to six months of training to the ALSTON & BIRD attorneys who were involved in the defense of DUPONT in *Bush Ranch*, including Dow KIRKPATRICK, Elizabeth GILLEY and Todd DAVID.

78. Dr. JOHNSON provided specific educational assistance to ALSTON & BIRD attorneys to explain to them how to analyze soil and water samples for the purpose of litigation. The ALSTON & BIRD attorneys grasped the data fairly rapidly.

79. Dr. JOHNSON assisted Dow KIRKPATRICK, Elizabeth GILLEY and Todd DAVID in defending DUPONT in the *Bush Ranch* case. During the trial he discussed with

said ALSTON & BIRD counsel chromatogram interpretation, detection limits and DUPONT SU's in the soil.

80. During the period from June 16, 1993 to June 26, 1993 Dr. David JOHNSON was at the law office of ALSTON & BIRD in Atlanta, Georgia assisting ALSTON & BIRD counsel in trial preparation on analytical chemistry matters for the upcoming *Bush Ranch* trial.

81. In a telephone conversation on June 19, 1993 between Robert Bethem and Robert Peterson of ALTA LABS in California and Elizabeth GILLEY, Todd DAVID and Kennard NEAL of ALSTON & BIRD in Atlanta, Georgia, one or more of the ALSTON & BIRD attorneys instructed ALTA, *inter alia*, to re-test the soil samples to "confirm (defirm) suspected positives." This conduct violated 18 U.S.C. Sections 1503, 1512 and 1343.

82. On June 22, 1993, Robert Peterson of ALTA Labs reported numerous positive SU findings in the soils of all four *Bush Ranch* plaintiffs to Elizabeth GILLEY of ALSTON & BIRD in a telephone conversation between El Dorado Hills, California and Atlanta, Georgia. Thereafter, summary tables using a "detection limit" of 25 parts per trillion (ppt) were faxed from ALTA to Ms. GILLEY, showing the same positive findings.

83. After the initial positive findings were reported by ALTA, on information and belief, GILLEY communicated these findings to DUPONT. On information and belief, DAVID JOHNSON was aware of the ALTA data and findings. On information and belief, DUPONT and ALSTON & BIRD conspired and agreed between June 19 and June 25 to illegally conceal the positive findings by violating the court's June 24, 1992 Order, Rule 26 of the

Federal Rules of Civil Procedure, and the May 28 agreement between ALSTON & BIRD and POPE, McGLAMRY. This conduct violated 18 U.S.C. Section 1503.

84. On June 25, 1993, Elizabeth GILLEY told Robert Bethem in a telephone conversation to change the format of the summary tables and to raise the "detection limit" from 25 ppt to 50 ppt. Bethem agreed to do so and did so. This conduct violated 18 U.S.C. Sections 1503, 1512 and 1343.

85. At the time, ALSTON & BIRD, DUPONT and ALTA Labs knew that the actual detection limits for SU's in soil tests being conducted by ALTA were significantly below 50 ppt. ALTA's raw data revealed that numerous positive findings for SU's in soil were identified and quantified at levels below 25 ppt. The detection limit was artificially raised in order to avoid reporting positive findings. This conduct violated 18 U.S.C. Section 1503.

86. On June 26, 1993, ALTA faxed the new 50 ppt "detection limit" summary tables to Nicholas ALBERGO, DUPONT's expert witness in *Bush Ranch*, in care of Elizabeth GILLEY. That same day, ALBERGO produced the summary tables (but none of the raw data) at his deposition in *Bush Ranch*. In that deposition, he falsely testified that no SU's were found in the soils of the *Bush Ranch* plaintiffs at a 50 ppt detection limit. All of this conduct violated 18 U.S.C. Sections 1503 and 1343.

87. Elizabeth GILLEY represented DUPONT and ALBERGO's deposition and did nothing to correct the misrepresentation of fact inherent in ALBERGO's testimony, despite the fact that she knew that ALTA had made numerous positive findings of SU's in the soils of the *Bush*

*Ranch* plaintiffs. This conduct violated 18 U.S.C. Section 1503.

88. None of the ALTA raw data was provided to the *Bush Ranch* plaintiffs despite the above-mentioned court orders requiring it; despite ALSTON & BIRD's agreement, on DUPONT's behalf, that the data would be provided; and despite the fact that the Rules of Court required it. This conduct violated 18 U.S.C. Section 1503.

89. On August 4, 1993, ALBERGO testified at the *Bush Ranch* trial. He testified that he had personally discussed ALTA's results with the analytical chemists and that he had personally looked at the data. This testimony was false. Elizabeth GILLEY knew that this testimony was false, and did nothing to correct it. This conduct violated 18 U.S.C. Section 1503.

90. ALBERGO also testified, in response to questioning from Elizabeth GILLEY, that he was "absolutely confident" there were "no" SU's in the plaintiffs' soils. Elizabeth GILLEY, Todd DAVID and Dow KIRKPATRICK knew this testimony conveyed a false impression to the Court, the jury and the Plaintiffs.

91. Neither Elizabeth GILLEY, Todd DAVID, Dow KIRKPATRICK nor any other ALSTON & BIRD attorney made any attempt to correct the misrepresentations of fact made to the court and jury by ALBERGO. This conduct violated 18 U.S.C. Section 1503.

92. DUPONT and ALSTON & BIRD elicited ALBERGO's testimony with full knowledge that it was false and with the intent to defraud the Court, jury and plaintiffs in the *Bush Ranch* case, other Benlate claimants

including plaintiffs herein. This conduct violated 18 U.S.C. Section 1503.

93. By failing to comply with the Court's discovery orders, DUPONT intentionally withheld the raw data from the plaintiffs in *Bush Ranch* so that they could accomplish their fraudulent ends.

94. In so doing, DUPONT committed wire fraud (18 U.S.C. Section 1343), obstructed justice (18 U.S.C. Section 1503), and tampered with witnesses (18 U.S.C. Section 1512), depriving the *Bush Ranch* plaintiffs of a fair trial. Further, by, *inter alia*, mailing falsely sworn discovery responses to Plaintiffs, they committed mail fraud (18 U.S.C. Section 1341). Such conduct was intended by Du Pont to mislead the *Bush Ranch* plaintiffs as well as other Benlate claimants including Plaintiffs herein, who were following the *Bush Ranch* trial.

95. As a proximate result of the events alleged herein, the *Bush Ranch* plaintiffs were deprived of a fair trial in the *Bush Ranch* case. Had they been given access to the ALTA raw data in a timely fashion the data would have been analyzed by Dr. Jodie Johnson, the *Bush Ranch* plaintiffs' analytical chemical expert, who then would have rendered opinions at the trial that SU's had been found in the soils of the *Bush Ranch* plaintiffs, which would have proved defect and causation in fact.

96. At the *Bush Ranch* trial DUPONT characterized the SU contamination issue as the "critical issue in the case". As a result of the fraud perpetrated by Defendant, the *Bush Ranch* plaintiffs and their attorneys agreed to settle their cases for amounts far below the settlement value that would have been reasonable if the ALTA raw data had been revealed. Armed with the ALTA raw data,

the *Bush Ranch* plaintiffs would have obtained a more favorable result, either by settlement or judgment, than they did without such data.

97. Had the actual truthful ALTA data been made available in the *Bush Ranch* trial, hundreds of other Benlate claimants, including Plaintiffs herein, would have learned that Du Pont's own tests revealed SU contamination in Benlate. Such knowledge would have increased the value of all Benlate claims, including Plaintiffs' herein. Du Pont's fraudulent concealment of the ALTA data defrauded not only the *Bush Ranch* plaintiffs but the other Benlate claimants following the *Bush Ranch* trial, including Plaintiffs herein.

## CONCEALMENT OF ALTA LABS DATA IN LAMBERT v. DUPONT

98. Following the *Bush Ranch* trial another Benlate case commenced in State Court in Florida styled as *Billy Lambert v. DUPONT*. The plaintiff was represented by Chris Skambis and DUPONT was represented by Patrick Lee of CROWELL & MORING as well as ALSTON & BIRD. The trial started on September 13, 1993.

99. Prior to the commencement of trial, DUPONT had Lambert's soil analyzed for the presence of SU's. On August 24, 1993, ALTA testing revealed a positive finding for Glean, a DUPONT SU, at 24 ppt.

100. On September 16, 1993, Patrick Lee made an opening statement in the *Lambert* trial and stated that DUPONT had tested the soil at Lambert's through an outside laboratory, (i.e., ALTA) and that those soil tests "proved conclusively that there are no sulfonylureas, no

SU's, no atrazine in the soil . . . " At the time of that statement, DUPONT knew it was false. This conduct violated 18 U.S.C. Section 1503.

101. During the trial DUPONT had the Lambert soil tested again, on October 14, 1993. The results confirmed the initial finding of the presence of SU's in Lambert's soil. More than a dozen consecutive test results revealed positive findings of SU's in Lambert's soil. This was reported to DUPONT by ALTA during the *Lambert* trial.

102. In spite of this knowledge, Patrick Lee stated in the closing argument in *Lambert* that the only reason DUPONT had not brought their analytical chemical expert, Dr. Richard Browner, to testify regarding the ALTA test results was because plaintiffs had not presented testimony on the issue of SU contamination.

103. In truth, the real reason Dr. Browner did not testify was that positive SU findings had been discovered in Lambert's soil.

104. At no time did DUPONT or its attorneys attempt to correct the misrepresentations regarding the *Lambert* ALTA results to the court or to the plaintiffs. Misrepresenting the *Lambert* ALTA test results and the reasons for DUPONT's failure to call Dr. Browner as a witness violated 18 U.S.C. Section 1503 and was part of its nationwide scheme to defraud Benlate claimants, including Plaintiffs herein.

## CONCEALMENT OF THE ALTA LABS DATA IN KAWAMATA AND TOMONO v. DUPONT

105. At the same time that the *Bush Ranch* case was in trial, in July of 1993, discovery was underway in two

Hawaii Benlate cases which were consolidated for trial in the Third Circuit before Judge Ibarra. Those cases were styled *Kawamata Farms Inc. v. United Agri Products, et al.*, Civil No. 91-437; and *Stanley T. Tomono, et al., v. DuPont*, Civil No. 92-247K, (hereinafter *Kawamata/Tomono*).

106. Plaintiffs' attorneys Sheehe Venditteli were in contact with the plaintiffs' lawyers in *Kawamata/Tomono* during the course of their respective actions.

107. The *Kawamata/Tomono* Plaintiffs had requested DUPONT to produce all tests related to SU contamination in Benlate. On July 7, 1993, DUPONT corporate counsel George FRANK testified on behalf of DUPONT at a hearing before Judge Ibarra in the Third Circuit Court in Kealakekua, Hawaii. The purpose of the hearing was for the court to consider evidence regarding DUPONT's repeated violation of rules of discovery and court orders regarding discovery.

108. Mr. FRANK had been identified by DUPONT as the person in charge of coordinating Benlate litigation in all cases, who would have personal knowledge about the discovery procedures utilized by DUPONT in the Benlate cases i.e., how to answer interrogatories and requests for production of documents.

109. Mr. FRANK was specifically questioned by plaintiffs' counsel about documents responsive to interrogatory No. 1 of plaintiff Tomono's first set of interrogatories, which related to ongoing and completed 1993 testing by DUPONT. Mr. FRANK testified that " . . . we have no . . . ongoing 1993 testing."

110. Mr. FRANK's testimony at the July 7, 1993 hearing in this regard was false. At the time of Mr. FRANK's testimony, DUPONT had ongoing testing for the presence of DUPONT's SU's in the *Bush Ranch* plaintiffs' soil through its agent ALTA Laboratories in June and July 1993. This conduct violated 18 U.S.C. Section 1503.

111. Mr. FRANK was also asked by plaintiffs' counsel in *Kawamata/Tomono* why the privilege log submitted by DUPONT in that case contained no reference to any kind of 1993 research, whether by DUPONT and DUPONT consultants or outside counsel. Mr. FRANK responded, " . . . you have . . . been produced those documents . . . ".

112. The statement of Mr. FRANK that the plaintiffs in *Kawamata/Tomono* had [sic] been produced all such documents as of July 1993 was false. The plaintiffs in that case did not receive any of the ALTA *Bush Ranch* raw data until May 17, 1994, almost a year later, after disclosure thereof was ordered by the Supreme Court of Hawaii.

113. Mr. FRANK's inaccurate and misleading testimony regarding the existence of the ALTA *Bush Ranch* test data was intentional conduct by DUPONT. Mr. FRANK's testimony was meant to conceal the existence of the *Bush Ranch* raw data and the evidence of Benlate contamination that it revealed. Mr. FRANK's testimony was meant to induce the plaintiffs and court in that case to believe that no such documents existed, and to mislead and conceal such raw data from all Benlate claimants including Plaintiffs herein. This conduct violated 18 U.S.C. Section 1503.

114. In fact, as of July 7, 1993, the same day that Mr. FRANK testified, Ms. GILLEY of ALSTON & BIRD

received the ALTA *Bush Ranch* raw data from ALTA Laboratories; data which she and DUPONT knew had been in existence for almost a month.

115. Three years later, the above facts regarding Mr. FRANK's false testimony and DUPONT's knowledge of the ALTA Laboratories raw data prompted Judge Ibarra to find "clear and convincing . . . evidence that DUPONT committed fraud when Mr. FRANK represented to this court and the plaintiffs that there was no ongoing 1993 testing." Order of the Court, dated August 19, 1996, Exhibit "B", p.39.

116. On May 27, 1993 Judge Ibarra ordered DUPONT to produce " . . . all records, documents, correspondence and all other related materials pertaining to defendant DUPONT's ongoing and completed 1993 testing regarding Benlate 50 DF and Benlate 50 WP." This order to compel was with respect to plaintiffs' first set of interrogatories, interrogatory No. 21.

117. On June 23, 1993 Judge Ibarra found that DUPONT had failed to comply with his previous discovery order and required DUPONT to produce a response by July 2, 1993. Thereafter, DUPONT failed to comply with the July 2, 1993 deadline regarding interrogatory No. 21 and Judge Ibarra ordered DUPONT to produce all documents responsive to this interrogatory on or before July 19, 1993, with the exception of the responsive documents that pertained to macadamia nuts which were to be produced no later than July 26, 1993. (See Exhibit "B", p.13.)

118. In addition, plaintiffs' third set of interrogatories, interrogatory No. 5 requested that DUPONT produce " . . . all research data, reports, tests, investigations,

analysis, and all other materials pertaining to the effects of sulfonylurea products and soil relating to recropping problems . . . ". On July 26, 1993 the court ordered DUPONT to respond to the interrogatory and produce all documents responsive thereto no later than August 25, 1993.

119. The ALTA *Bush Ranch* documents were responsive to plaintiffs' interrogatories Nos. 21 and 5 above.

120. DUPONT failed to produce the *Bush Ranch* ALTA documents in response to the court orders mentioned herein.

121. The failure to produce the ALTA documents in violation of Judge Ibarra's order was intentional conduct by DUPONT. Judge Ibarra made such a finding in his August 19, 1996 order. (See Exhibit "B", p.15.)

122. Failure to produce the ALTA *Bush Ranch* documents in violation of three court orders was intentional by DUPONT, and constituted an obstruction of justice in violation of 18 U.S.C. Section 1503.

123. In May 1995, fraud hearings were held before Judge Elliott which provided factual information on which he relied in issuing his order of August 21, 1995. See Exhibit "A". At those hearings, lawyers from ALSTON & BIRD testified regarding whether or not the ALTA *Bush Ranch* raw data was proffered or produced or used during the *Bush Ranch* trial.

124. Dow KIRKPATRICK testified at the fraud hearings in May of 1995 that the ALTA raw data was brought to the courtroom as required by Federal Rule of Evidence 1006, so that it was available to be offered in the courtroom on August 4, 1995. Mr. KIRKPATRICK further

testified to his belief on August 4, 1993 that DUPONT had offered the ALTA raw data during the *Bush Ranch* trial, and that such an offer obviously would waive any work product privilege claim pertaining to the documents.

125. ALSTON & BIRD attorney, Ms. GILLEY testified in the fraud hearings before Judge Elliott in May of 1995. At that time she testified that the ALTA raw data was offered to the plaintiffs on August 4, 1993 during the *Bush Ranch* trial.

126. In the May 1995 fraud hearings ALSTON & BIRD attorney Todd DAVID testified that during the *Bush Ranch* trial, when the ALTA summary document was tendered, that amounted to a waiver of the work product privilege.

127. At the same time that DUPONT was waiving the work product privilege with respect to the ALTA *Bush Ranch* documents in the *Bush Ranch* trial in July and August of 1993, DUPONT was asserting the work product privilege in Hawaii in *Kawamata/Tomono*, in order to prevent access to the very same ALTA documents.

128. On November 15, 1993, at a hearing before Judge Ibarra in *Kawamata/Tomono*, John Lacy, DUPONT's counsel in that case, represented to the Court as follows:

The Court: Now, you argue that the other tests are protected under work product?

Mr. Lacy: That's correct Your Honor.

The Court: Other tests and other litigation?

Mr. Lacy: That's right. And it's not been brought up until this motion.

129. In *Kawamata/Tomono*, DUPONT submitted a privilege log describing the ALTA *Bush Ranch* data and claimed that such data was protected by the work product privilege. At the time of this representation, DUPONT had already waived the work product privilege with respect to these documents by its assertions and conduct in the *Bush Ranch*.

130. DUPONT's representations that the ALTA *Bush Ranch* data was covered by work product under these circumstances was an intentional misrepresentation, was fraudulent and amounted to an obstruction of justice in violation of 18 U.S.C. Section 1503.

131. On November 13, 1993, DUPONT represented to Judge Ibarra that it had never waived the work product privilege on SU testing conducted at the direction of local counsel in other jurisdictions. At the time this statement was made it was false. DUPONT knew it was false and did nothing to correct the misrepresentation to the court. This was a violation of 18 U.S.C. Section 1503.

132. In January 1994, DUPONT represented to Master Frank Takao, who had been appointed by Judge Ibarra to review the claim of work product with respect to many documents, including the ALTA documents, that " . . . none of the documents submitted to the Master have ever been produced to another party or introduced or proffered in any other Benlate trial . . . no documents other than the above were proffered or in any way used in connection with any other Benlate trial." In fact, at the time of this representation, DUPONT had used the ALTA documents in the *Bush Ranch* trial; and DUPONT claims

to have proffered them as well. Thus, the representation to Master Takao was also false, in violation of 18 U.S.C. Section 1503.

133. On February 16, 1994 DUPONT represented to Judge Ibarra " . . . none of the documents submitted to the Master have ever been produced to another party or introduced or proffered in any other Benlate trial." This statement made by DUPONT was misleading, inasmuch as DUPONT had already waived work product protection as to these documents.

134. DUPONT intentionally concealed from Judge Ibarra the conduct and beliefs of DUPONT's *Bush Ranch* counsel with respect to the privileged status of, offer of and prior use of the *Bush Ranch* ALTA documents. Further, DUPONT intentionally withheld this crucial information in an attempt to prevent the disclosure to Kawamata, Tomono, Plaintiffs herein and Judge Ibarra of Benlate soil contamination data disclosed in the ALTA documents which went to the heart of the *Kawamata* and *Tomono* cases. Such intentional withholding and intentional misrepresentations was done by DUPONT for the purpose of inducing reliance by Judge Ibarra and the plaintiffs in that case and in other cases around the country on the misrepresentations so that the facts contained in the ALTA raw data could continue to be concealed.

135. The above-described failures to comply with court orders and the intentional misrepresentations to the Court in the Third Circuit, State of Hawaii, were all part of an overall scheme perpetrated by DUPONT and its co-conspirators for the purpose of concealing the damaging contamination evidence that existed in the ALTA documents. This concealment was intended to and did deprive

Benlate claimants including Plaintiffs herein of the right to recover fair compensation for the harm they sustained due to Benlate in a timely manner.

136. Had the ALTA materials been produced when they should have been in *Kawamata/Tomono*, Plaintiffs herein would have had access to those materials and they could have been used in Plaintiffs' trial.

FURTHER CONCEALMENT OF THE ALTA LABS DATA IN RITTER-WHITWORTH v. DUPONT

137. Following the *Bush Ranch* and *Lambert* trials, another Benlate case commenced in State Court in Florida, styled as *Ritter-Whitworth v. DUPONT*. The plaintiff was represented by Mike Martin and DUPONT was represented by ALSTON & BIRD. The trial started on January 3, 1994. Plaintiffs' action was being triad [sic] at this same time.

138. On information and belief, on or about January 12, 1994 wipe samples obtained in August of 1993 from the Belle facility were sent to ALTA Labs to be tested for the presence of SU's. At Belle, both benomyl, the active ingredient of Benlate, and SU's manufactured by DUPONT were present. As was the case in *Bush Ranch*, *Kawamata/Tomono* and *Lambert*, plaintiffs' theory of liability in *Ritter-Whitworth* included the allegation that cross-contamination of Benlate with the DUPONT SU's had occurred at the Belle facility. As was the case in *Bush Ranch*, *Kawamata/Tomono* and *Lambert*, DUPONT denied that this had occurred.

139. On information and belief, the wipe samples obtained in August 1993 were obtained from locations at

the Belle facility where no SU's should have been present; e.g., in areas where benomyl was being manufactured, and in areas beyond the HEPA filters intended to prevent the egress of any SU's from areas meant to contain them.

140. On information and belief, on or about January 25, 1994, a representative of ALTA informed DUPONT that wipe samples from areas in which benomyl was being manufactured had shown the presence of SU's; and that wipe samples taken downstream from the HEPA filter(s) had also shown the presence of SU's. These facts were favorable to Plaintiffs' position and adverse to DUPONT's.

141. On information and belief, notwithstanding DUPONT's knowledge of the these [sic] facts, DUPONT presented its employee Dale Holstein at the *Ritter-Whitworth* trial on or about February 1, 1994, to testify, *inter alia*, that SU's could not contaminate benomyl at Belle; and/or that it was physically impossible for such cross-contamination to have occurred, due to reasons such as separate facilities, equipment, and personnel, and a filter system which completely prevented any contamination by SU's.

142. On information and belief, when it presented Mr. Holstein's testimony, DUPONT knew that it was false, and that ALTA's testing had established that SU's were present in areas in which benomyl was being manufactured, and beyond the HEPA filters.

143. On information and belief, DUPONT did not disclose this information to plaintiffs' counsel in *Ritter-Whitworth*, or to the court, and instead presented false testimony on this important issue, thereby violating 18 U.S.C. Section 1503. This conduct was in furtherance of

DUPONT's nationwide scheme to defraud Benlate claimants so as to defeat or diminish their claims.

144. DUPONT's fraudulent concealment of ALTA data in *Kawamata/Tomono Lambert*, and *Ritter-Whitworth* was in part intended to and did in fact prevent Plaintiffs herein from discovering the fraud DUPONT had perpetrated in *Bush Ranch* and was meant to and did prevent them from seeking redress for such fraud in a timely manner.

145. On information and belief, the cases set forth above are not the only ones in which DUPONT illegally and improperly concealed the ALTA data, in spite of applicable discovery requests, court orders, and court rules.

## DUPONT ILLEGALLY CONCEALED MORE EVIDENCE OF CONTAMINATED BENLATE

146. Between 1989 and 1992, DUPONT caused to be conducted and/or was aware of laboratory testing performed by its agents, A&L Labs Midwest, Envirotech, LaPorte, and Terra, on many lots of Benlate manufactured between 1987 and 1991. Some of the lots were tested for the presence of the triazine herbicides atrazine, simazine, cyanazine, and pendimethilin. Others were tested for the presence of the fungicides chlorothalonol and Nustar (a brand name for flusilazole). Literally hundreds of the tests showed the presence of one or more of these substances contaminating hundreds of lots of Benlate. DUPONT knew of the testing and knew of the results. Most of the tests referred to above were completed by the end of 1991. All of the tests referred to above were completed no later than 1992. Most of the results of these tests are set out in

Exhibit 9369A in the case of *Kawamata Farms, Inc. v. United Agri Products et al.*, Civil No. 91-437 (Kona), Circuit Court of the Third Circuit, State of Hawaii. A true and correct copy of said Exhibit is attached hereto as Exhibit "C". (Note that page 25 and 26 of that exhibit are duplicates.) The documents reporting the tests being referred to herein bear the Bates prefix designations BAM or BPM.

147. The *Bush Ranch* plaintiffs' First Request for Answers to Interrogatories, served on or about March 3, 1992, included Interrogatory #49: "Has the presence of any compound with fungicidal activity other than benomyl or methyl-2-benzimidazole carbamate (MBC) been identified in any samples of Benlate 50 DF . . . that has been subjected to analytical testing by or on behalf of defendant? If so, identify each and every such compound and state the number of samples of Benlate 50 DF . . . in which each and every such compound has been identified."

148. DUPONT, through ALSTON & BIRD, resisted the *Bush Ranch* plaintiffs' attempts to discover this information, filing objections to the aforementioned requests. Judge Elliott ordered DUPONT to answer the interrogatory by July 9, 1992.

149. By Order dated June 24, 1992, Judge Elliott overruled DUPONT's objections to the Request for Answers to Interrogatories, and ordered DUPONT "to review its answers to Plaintiffs' first interrogatories after this order is entered and to fully answer each of Plaintiffs' first interrogatories within fifteen days from the date of this order."

150. A truthful response to said interrogatory would have included reference to all the 1989-1991 positive findings set out in Exhibit 9369A for chlorothalonol and Nustar (flusilazole). DUPONT deliberately omitted any reference to these positive findings in answering the interrogatory, attempting to defraud and defrauding the Plaintiffs and the Court, thereby committing the offense of Obstruction of Justice in violation of 18 U.S.C. Section 1503, and mail fraud in violation of 18 U.S.C. Section 1341.

151. In *Bush Ranch*, Plaintiffs' First Request for Production of Documents, served on or about March 3, 1992, Request #64 sought production of "All documents relating to and/or referencing any report or finding from any person or party, whether or not employed by defendant, of the detectable presence of other compounds with fungicidal activity in any samples assayed of Benlate 50 DF . . .".

152. DUPONT, through ALSTON & BIRD, resisted Plaintiffs' attempts to discover this information, filing objections to the aforementioned requests. Judge Elliott ordered DUPONT to produce the aforementioned documents.

153. By Order dated June 24, 1992, Judge Elliott overruled DUPONT's objections to the Requests for Production of Documents, ordered DUPONT to review its responses to Plaintiffs' requests for production ". . . and to fully answer each of Plaintiffs' first requests for production of documents within fifteen days from the date of this order."

154. In that same Order, the Court ruled explicitly that in connection with the consolidated discovery, and

DUPONT's supplemental responses to it, DUPONT must provide all documents or copies of documents received by or contained in the files of any and all of its retained or employed experts, consultants, attorneys, insurance carriers, and insurance adjusters, in addition to documents in DUPONT's own files. In that same Order, the Court specifically overruled DUPONT's objections to producing documents involving Benlate claims, lawsuits and tests DUPONT had conducted since March 1991, with only DUPONT's claims of attorney-client privilege and work product remaining for consideration by the Court. The Court ordered DUPONT to document any claim of privilege or work product protection in a detailed log to be submitted to the Court by DUPONT.

155. The BAM and/or BPM prefixed documents which recorded, reported, and contained the data and results of the 1989-1991 tests with positive findings for the presence of chlorothanalol or Nustar reflected in Exhibit 9369A were responsive to Request #64, and were required to be produced to Plaintiffs by July 9, 1992. DUPONT deliberately produced none. Nor did DUPONT list any of them in a privilege log, or in any way notify the Plaintiffs or the Court of the existence of such documents or test results. This conduct violated 18 U.S.C. Section 1503, and was intended to and did defraud the Plaintiffs and the Court.

156. In *Bush Ranch*, Plaintiffs' First Request for Production of Documents, Request #63 requested the production of "All documents reflecting, referencing, and/or relating to any tests and/or assays directed at the detection of atrazine in samples of Benlate DF . . . performed by A&L Laboratories or any other laboratory or entity." Request #65 requested the production of: "To the

extent not already requested, all documents relating to and/or referencing any report or finding from any person, or entity, whether or not employed by defendant, or other pesticidal compounds, including but not limited to, herbicides, in Benlate 50 DF or any other benomyl-containing fungicide."

157. The BAM and/or BPM documents which recorded, reported, and contained the data and results of the 1989-1991 tests with positive findings for the presence of atrazine were responsive to Request #63, and were required to be produced to Plaintiffs by July 9, 1992. DUPONT deliberately produced none. Nor did DUPONT list any of them in a privilege log, or in any way notify the Plaintiffs or the Court of the existence of such documents or test results. This conduct violated 18 U.S.C. Section 1503, and was intended to and did defraud the Plaintiffs and the Court.

158. The BAM and/or BPM documents which recorded, reported, and contained the data and results of the 1989-1991 tests with positive findings for the presence of atrazine, simazine, cyanazine and/or pendimethilin were responsive to Request #65, and were required to be produced to Plaintiffs by July 9, 1992. DUPONT deliberately produced none. Nor did DUPONT list any of them in a privilege log, or in any way notify the Plaintiffs or the Court of the existence of such documents or test results. This conduct violated 18 U.S.C. Section 1503, and was intended to and did defraud the Plaintiffs and the Court.

159. The *Bush Ranch* plaintiffs' First Request for Answers to Interrogatories, served on or about March 3, 1992 included Interrogatory #50: "Has the presence of any compound with herbicidal activity been identified in any

samples of Benlate 50 DF . . . that has been subjected to analytical testing by or on behalf of defendant? If so, identify each and every such compound and state the number of samples of Benlate 50 DF . . . in which each and every such compound has been identified."

160. A truthful response to said interrogatory would have included reference to all the 1989-1991 positive findings set out in Bates designations BAM and BPM in Exhibit 9369A for atrazine, simazine, cyanazine and pendimethilin. DUPONT deliberately omitted any reference to these positive findings in answering the interrogatory, attempting to defraud and defrauding the Plaintiffs and the Court, and thereby committing the offense of Obstruction of Justice pursuant to 18 U.S.C. Section 1503.

161. By Order dated December 10, 1992, Judge Elliott ordered DUPONT to have its Chief Executive Officer, Edgar S. WOOLARD, Jr., submit an affidavit to the Court by December 31, 1992, which "shall . . . state that he has caused inquiry to be made by persons with knowledge and authority as to all documents responsive to Plaintiffs' First Request for Production of Documents and has ordered such person or persons to execute an affidavit or affidavits verifying that all responsive documents have been delivered to the Court and that no responsive documents have been intentionally withheld by the Defendant from production."

162. On January 5, 1993, DUPONT filed in response to the December 10 Order an Affidavit of George A. FRANK. In that affidavit, Mr. FRANK, DUPONT Corporate Counsel assigned to the Benlate litigation, swore that he was "responsible for matters related to DUPONT's defense of the Benlate litigation including the efforts of

DUPONT's litigation support team assigned to the Benlate litigation". Mr. FRANK swore that he had the "knowledge to provide the certification required by the court's December 10 Order." That statement was false, was an attempt to defraud and did defraud Plaintiffs and the Court, and was a violation of 18 U.S.C. Section 1503. Mr. FRANK certified that he did not know of or have any reason to believe that there were any documents responsive to Plaintiffs' First Requests for Production of Documents.

163. By then, all the BAM and BPM documents referred to above were in existence, and Mr. Frank either knew they existed or knew he had insufficient information to give the affidavit set forth above. In either case, the affidavit was false.

164. DUPONT knew that Mr. Frank's affidavit was false yet submitted it with the intention of defrauding the *Bush Ranch* plaintiffs and other Benlate claimants including Plaintiffs herein.

165. The *Bush Ranch* plaintiffs' May 24, 1993 request to supplement also required that this material be produced, and again it was not.

166. In Plaintiffs' underlying products liability actions, DUPONT's concealment of the BAM, BAL, and BPM Bates prefixed information continued. For example, Plaintiffs's lawyers Sheehe Venditteli asked DUPONT to produce, *inter alia*, "Any and all documents which set forth the results of testing of Benlate 50 DF by defendants Du Pont or its agents during the period January 1, 1986 to the present." Such a request obligated DUPONT to produce documents that were found in the BAM, BAL, and BPM series.

167. DUPONT responses failed to identify the BAM, BAL and BPM Bates prefixed documents, and DUPONT did so with the intention of concealing these tests from Plaintiffs.

168. On information and belief, DUPONT illegally concealed the BAM, BAL and BPM documents in this and other Benlate cases, in spite of applicable discovery requests, court orders, and court rules requiring their disclosure and production.

169. Benlate plaintiffs reasonably relied on DUPONT to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by DUPONT's officers and agents. They and their attorneys did so rely, and as a result of the fraud set forth above perpetrated by defendant, Plaintiffs and their attorneys agreed to settle their cases for amounts far below the settlement value that would have been reasonable if the BAM/BPM documents had been revealed.

170. In *Kawamata / Tomono* in the Third Circuit of the State of Hawaii, DUPONT also wrongfully concealed the test results referred to above showing serious herbicide and fungicide contamination in Benlate. Following is, in part, the way in which these documents were discovered and DUPONT's illegal attempts to keep their secret.

171. In August and November 1993 Judge Ibarra, of the Third Circuit Court of the State of Hawaii, issued two discovery orders requiring DUPONT to produce documents related to herbicide contamination of Benlate formulated by Defendant Terra, Platt and Bartlo. In response to these orders DUPONT identified a list of documents by Bates numbers that plaintiffs could examine at DUPONT's document depository in Wilmington, Delaware. The list provided

by DUPONT did not identify any documents with BAM, BAL or BPM Bates number prefixes.

172. On June 8 and 9, 1994 DUPONT employee Dennis Keeler was deposed in a Florida Benlate case. He identified three sets of documents with DUPONT BAM, BAL, and BPM Bates number prefixes that contained "nearly 100%" of all contamination tests results for Benlate 50 DF. DUPONT had not identified any documents in response to Judge Ibarra's discovery orders. Dr. Keeler was DUPONT's expert witnesses on SUs/Benlate contamination in the Plaintiffs' products liability trial.

173. DUPONT had no explanation in *Kawamata/Tomono* as to why these tests results showing contamination in Benlate had not been previously produced or identified.

174. As a sanction, Judge Ibarra admitted into evidence an 84 page summary of the contamination test results for Benlate 50 DF manufactured from 1987 through 1991. That document was plaintiffs' Exhibit 9369A, attached hereto as Exhibit "C".

175. On November 17, 1994 Dennis Keeler testified in *Kawamata/Tomono* and confirmed that the test results contained in plaintiffs' Exhibit 9369A were accurate. Except for the fact that pages 25 and 26 of Exhibit 9369A were duplicates, that testimony was correct.

176. At the time Judge Ibarra considered entering a default judgment against DUPONT for the intentional concealment of these Benlate contamination documents.

177. In January 1995, near the conclusion of the *Kawamata/Tomono* trial, Dennis Keeler was again deposed in the Florida case of *Smith v. DUPONT*. He testified that

additional BAM prefix documents showed Atrazine contamination of Benlate packaged by DUPONT's agent Bartlo. These results had not previously been reported and were not included in plaintiffs' exhibit 9369A. DUPONT contended that this new list of Bartlo contaminated lots had been produced to the plaintiffs in August of 1993 somewhere in 49 boxes of documents produced to plaintiff. However, the documents were not identified in DUPONT's response to interrogatories as being responsive to an interrogatory requesting such test data.

178. Judge Ibarra found that DUPONT's failure to properly identify the BAM documents in its discovery response was intentional and admitted the list and Keeler's deposition testimony into evidence on the last day of the *Kawamata / Tomono* trial.

179. The failure to identify the list of Bartlo contaminated lots as lots responding to plaintiffs' interrogatory No. 10 was intentional. Its purpose was to conceal the document from the plaintiffs in *Kawamata / Tomono* and also to conceal such information from all Benlate claimants including plaintiffs herein.

180. Such intentional concealment was a violation of 18 U.S.C. Section 1503 and amounted to an obstruction of justice.

181. After the conclusion of the *Kawamata / Tomono* trial, information in the Florida *Smith v. DUPONT* case revealed that DUPONT had concealed even more contamination of Benlate 50 DF at their Bartlo packaging plant.

182. The deposition testimony of Dennis Keeler read to the jury in the *Kawamata / Tomono* case on January 6, 1995, disclosed two lots of Benlate packaged at Bartlo

which were contaminated with atrazine. However, in the *Smith v. DUPONT* case, a January 30, 1995 supplemental interrogatory answer disclosed that 34 Bartlo lots had atrazine contamination of 1,000 parts per million or greater.

183. In fact, a DUPONT Blackhawk summary document identified 91 different contaminated Bartlo lots tested at DUPONT's Blackhawk warehouse. Some of the lots contained as much as 6,500 parts per million of atrazine.

184. This information was withheld by DUPONT from the plaintiffs in the *Kawamata / Tomono.*

185. The same information was withheld from Plaintiffs herein contrary to court orders mentioned above in *Bush Ranch.*

186. Judge Ibarra found that the " . . . the withholding of this information by defendant DUPONT was intentional." Judge Ibarra amended a previously instituted punitive sanction order and awarded the plaintiffs in *Kawamata / Tomono* $48,157.29 in fees and costs. He also reaffirmed and incorporated the $1.5 million fine as a proper sanction for DUPONT's intentional discovery abuse discovered after trial.

187. DUPONT's concealment of the Bartlo test data in *Kawamata / Tomono* was intentional and fraudulent. It was done by DUPONT for the purpose of concealing the damaging information from the plaintiffs in that case as well as the Plaintiffs herein.

188. The concealment of the BAM, BAL and BPM Bates prefixed information was done by DUPONT and is counsel with the intention of defrauding Benlate claimants

such as Plaintiffs herein, preventing them from learning the true facts, and inducing Plaintiffs herein and other Benlate claimants to settle their cases for substantially less than their reasonable value. The Plaintiffs herein, without such information, settled their cases for less than fair value. If such information had been provided by DUPONT, Plaintiffs and other Benlate claimants would have obtained a better result by way of settlement or judgment than they achieved. DUPONT's conduct in this regard constitutes a violation of 18 U.S.C. Section 1503 and amounts to an obstruction of justice.

189. DUPONT's fraudulent concealment of triazine herbicide, chlorothalanol and flusilazole contamination referred to above was in part intended to and did in fact prevent Plaintiffs herein from discovering the fraud DUPONT had perpetrated against them in *Bush Ranch* and was meant to and did prevent them from seeking redress for such fraud in a timely manner.

190. On information and belief, the cases set forth above are not the only ones in which DUPONT illegally and improperly concealed such data, in spite of applicable discovery requests, court orders, and court rules.

## THE COSTA RICA FIELD TESTS

191. In addition to illegally withholding the laboratory data referred to above, DUPONT also illegally withheld documents and information regarding testing it had conducted in the field in Costa Rica in 1992. The activity in Costa Rica was part of what DUPONT referred to as field tests done under real-world conditions. DUPONT relied substantially in *Bush Ranch* and subsequent Benlate trials on what it claimed was an unbroken series

of such tests as positively proving that Benlate did not harm plants.

192. In *Bush Ranch*, Plaintiffs requested and DUPONT was ordered to produce all Benlate-related documents, including all test data from 1992. On March 3, 1992, the *Bush Ranch* plaintiffs filed interrogatories and requests for production of documents which asked, *inter alia*, the following:

193. Interrogatory #25. "Identify by title and/or specific matter, date, location of study or test site, and person(s) conducting the study or test, all studies or tests, including plan bioassays, aimed, in whole or part, at characterizing, quantifying, evaluating and/or assessing the toxicity of benomyl, Benlate 50 DF, and/or any other benomyl-containing fungicide to plants of the same species and/or type at different ages and/or stages of maturity and/or development."

194. Request for Production #36. "To the extent not already requested, each and every document containing, referencing and/or relating to any opinion, evaluation, assessment, test, or study in any way concerning the phytotoxicity of Benlate 50 DF conducted by or on behalf of this defendant or by any other entity which are currently in the possession or under the control of this defendant or any of its subsidiaries or affiliates, domestic and international."

195. Request for Production #37. "To the extent not already requested, each and every document currently in the possession of this defendant or any of its subsidiaries or affiliates, domestic and international, or persons under the control of this defendant or any of its subsidiaries or affiliates, domestic and international, including its attorneys, referencing or relating to any opinion, evaluation,

assessment, test, or study in any way concerning the phytotoxicity of Benlate 50 DF which was directed or supplied to any present or former officer or employee of this defendant or any of its subsidiaries or affiliates, domestic and international, which was authored by any consultant or expert retained by or on behalf of this defendant, or any of its subsidiaries or affiliates, domestic and international, or by any person to whom this defendant agreed to contribute or did contribute any fees or expenses.

196. Request for Production #92. "To the extent not already requested, all documents referenced or referred to in defendant's answers to Plaintiffs' first interrogatories."

197. Judge Elliott ordered that all documents responsive to these requests be produced by DUPONT several times during the discovery phase of *Bush Ranch*.

198. As to any test data DUPONT intended to claim privilege, it was required to specifically identify such data on a privilege log by order of Judge Elliott.

199. Mr. George Frank, DUPONT's corporate counsel, also acknowledged during a hearing before Judge Elliott on August 26, 1992 his understanding that DUPONT was "to provide every single document that has any relationship to any aspect of Benlate, benomyl and related product." This and other statements by DUPONT and Judge Elliott demonstrate that the Court had effectively ordered, and that DUPONT and ALSTON & BIRD understood, that DUPONT was under an obligation to produce all Benlate-related documents, including all the documents identified in this Complaint as having been improperly withheld. DUPONT and ALSTON & BIRD acknowledged this obligation and promised to fulfill it. They are therefore

estopped from denying that they were under a legal duty to produce all the documents identified in this Complaint as having been improperly withheld. Even if Judge Elliot had not entered the specific orders referred to in this Complaint, the conduct and representations by DUPONT and ALSTON & BIRD referred to above estop them from denying that they were legally obligated to produce all the documents identified in this Complaint as having been improperly withheld.

200. Further, DUPONT specifically waived any privilege as to its 1992 testing after making numerous public statements as to how such 1992 testing exonerated Benlate. In October and November 1992 DUPONT represented in *Bush Ranch* its intention to release the 1992 testing data and stated on November 6, 1992 that "DUPONT has released their results to the world."

201. DUPONT, through CEO WOOLARD, also testified that its 1992 tests conclusively proved that Benlate cannot cause the kind of damage reported by claimants across the country, including Plaintiffs.

202. DUPONT, again through CEO WOOLARD on December 23, 1992 and May 14, 1993, and Mr. George FRANK, on January 4, 1993, made under oath representations to Judge Elliott in *Bush Ranch* assuring Plaintiffs and the Court that all 1992 test data had been produced to Plaintiffs. Further, in deposition Dr. Bruce HADLEY made the same representation on March 31, 1993 and May 21, 1993 as did Dr. Timothy OBRIGAWITCH on April 28, 1993, and April 29, 1993.

203. DUPONT took out an ad in the Wall Street Journal subsequent to *Bush Ranch* in which it denied that it had improperly withheld any information or documents.

204. DUPONT's claims that it had produced all documents relating to its 1992 tests were false and DUPONT knew they were false. This conduct violated 18 U.S.C. Sections 1503 and 1341.

205. DUPONT's claim that all of its 1992 tests exonerated Benlate was false and DUPONT knew it was false. This conduct violated 18 U.S.C. Section 1503.

206. In Plaintiffs' underlying products liability actions, DUPONT's concealment of the BAM, BAL, and BPM Bates prefixed information continued. For example, Plaintiffs's lawyers Sheehe Vendittelli asked DUPONT to produce, *inter alia*, "Any and all documents which set forth the results of testing of Benlate 50 DF by defendants Du Pont or its agents during the period January 1, 1986 to the present." Such a request obligated DUPONT to produce documents that were related to the 1992 Costa Rica field tests.

207. DUPONT responses failed to identify the documents relating to the 1992 Costa Rica field tests, and DUPONT did so with the intention of concealing these tests from Plaintiffs.

208. Not only did DUPONT fail to turn over documents relating to the 1992 Costa Rica field tests, it introduced into evidence in Plaintiffs' case materials relating to Florida and Hawaii field tests from 1992 and argued that these tests exonerated Benlate as the cause of Plaintiffs' damages. This conduct violated 18 U.S.C. Sections 1503 and 1341.

209. In fact, at the same time DUPONT was claiming its 1992 field tests exonerated Benlate and months before it gave its word, under oath, in *Bush Ranch* that all

1992 test documents had been produced, DUPONT knew it had been secretly conducting tests in Costa Rica in 1992 in which Benlate damaged and killed plants.

210. In September 1992, DUPONT hired Richard Welker, Welker Plants, Inc., and Richard Cefalo, a Welker employee, to conduct a field test on ornamental plants, using Benlate, in Costa Rica.

211. On September 5, 1992 DUPONT also had Welker sign an agreement to keep the research secret. The signing of these agreements was witnessed by Dr. Timothy OBRIGAWITCH and copies were sent to DUPONT corporate counsel, Mr. George FRANK.

212. In September 1992 DUPONT sent five (5) representatives, including OBRIGAWITCH, to Costa Rica to set up the test.

213. OBRIGAWITCH brought his own Benlate and purchased Benlate locally for application to the test plants. It was applied in a controlled and monitored situation, as set up by DUPONT.

214. In October 1992, Mr. Cefalo reported to DUPONT by way of OBRIGAWITCH that the plants were dying.

215. OBRIGAWITCH immediately instructed Mr. Cefalo to destroy the plants. This conduct violated 18 U.S.C. Sections 1503 and 1512.

216. Prior to their destruction, however, the damaged plants were photographed and videotaped by and at the direction of GERALD STEPHENSON, another DUPONT employee involved in the Costa Rica field test.

217. Despite the facts of the tests, the existence of data confirming the tests and the evidence proving Benlate caused plant damage, DUPONT never produced these documents in *Bush Ranch*, nor were they ever identified in any *Bush Ranch* privilege log, nor were they revealed in sworn testimony by any DUPONT employees who were specifically asked about such tests during discovery in 1993 in *Bush Ranch*. In fact, not only were they not revealed, their existence was categorically denied, under oath, by DUPONT employees. DUPONT concealed everything about the tests from the *Bush Ranch* plaintiffs, the Court and all other Benlate claimants and falsely represented that all 1992 test documents had been produced. This conduct violated 18 U.S.C. Sections 1503 and 1341.

218. When the Costa Rica test was uncovered in 1996 in connection with the *Davis Tree Farms, Inc. v. DUPONT* case filed in Florida, and the deposition of Mr. Cefalo was scheduled, DUPONT went to Costa Rica and attempted to intimidate and/or impede his testimony, in violation of 18 U.S.C. Sections 1503 and 1512.

219. In that case, DUPONT admitted it had waived any work product objection with respect to the 1992 test documents and yet obstructed discovery and refused to produce them even in the face of a court order compelling it to do so and even under threat of a default order. This conduct violated 18 U.S.C. Sections 1503 and 1512.

220. In that same case, DUPONT obstructed the deposition of Leon Vargas, a chemist hired by DUPONT in connection with the Costa Rica field test, by fabricating his witness status so as to arguably allow a claim of privilege only after speaking with him and finding out he

intended to tell the truth as damaging as it was to DUPONT. This conduct violated 18 U.S.C. Sections 1503 and 1512.

221. DUPONT also attempted to impede Vargas's testimony and extracted a confidentiality agreement from him after it was informed the field tests results were damaging to DUPONT. This violated 18 U.S.C. Sections 1503 and 1512.

222. Once the Costa Rica test was uncovered, DUPONT, in a last ditch effort, mislabeled and concealed the secrecy agreement and the contract with Welker Plants, Inc., on the privilege log. This conduct violated 18 U.S.C. Sections 1503 and 1512.

223. DUPONT fraudulently claimed that the Costa Rica test was not a test because no one from DUPONT had viewed the results. That was also subsequently proved to be a false claim, when Mr. STEPHENSON was forced – by his own passport entry – to admit his trip to Costa Rica was to visually record the plant damage.

224. DUPONT concealed the Costa Rica test and the documents and evidence associated with it in many other Benlate cases, including *Bush Ranch, Kawamata/Tomona*, in spite of applicable discovery requests, court orders, and court rules requiring its disclosure. Such concealment was in violation of 18 U.S.C. Section 1503. In addition, due to the cooperation among the plaintiffs' lawyers in *Bush Ranch* and *Kawamata/Tomono* with Sheehe Vendittelli, such information would have been known to the Plaintiffs.

225. Plaintiffs reasonably relied on DUPONT to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the

court, and representations made under oath to the court by DUPONT's officers and agents. They and their attorneys did so rely, and as a result of the fraud set forth above perpetrated by Defendant, Plaintiffs and their attorneys agreed to settle their cases for amounts far below the settlement value that would have been reasonable if the Costa Rica field test had been revealed.

226. DUPONT's fraudulent concealment of the Costa Rica testing was in part intended to and did in fact prevent Plaintiffs herein from discovering the fraud DUPONT had perpetrated in *Bush Ranch* and was meant to and did prevent them from seeking redress for such fraud in a timely manner.

227. The above-referenced evidence was damaging to DUPONT and very helpful to Plaintiffs and would clearly have enhanced their cases resulting in settlements or judgments much larger than the actual settlement.

INTIMIDATING AND IMPEDING WITNESSES

228. In various litigation of Benlate claims DUPONT obstructed justice, in violation of 18 U.S.C. Section 1503, and tampered with witnesses, in violation of 18 U.S.C. Section 1512, by attempting to intimidate and/or impede witnesses who planned to testify against DUPONT, in addition to the acts described above.

229. During trial of this action, Dr. OBRIGAWITCH, while on a break during trial, and just outside the courtroom, walked up to plaintiffs' expert, Dr. Schneider, and gestured to him by slicing his finger across his throat and said to him "You're going down." This caused Dr. Schneider and others to be concerned for his personal safety. In

an evidentiary hearing on the matter, Dr. OBRIGAWITCH expressed personal animus to Plaintiffs' attorney Philip Sheehe. This conduct resulted in an order prohibiting Dr. OBRIGAWITCH from intimidating witnesses and Mr. Sheehe, and the matter was referred to the State Attorney for investigation. Dr. OBRIGAWITCH hired a criminal defense attorney, but the matter was stricken on DUPONT's motion after the settlement of Plaintiffs' case. OBRIGAWITCH's threat to Schneider was obstruction and/or attempted obstruction of justice, and intimidation of a witness, in violation of 18 U.S.C. Sections 1503 and 1512.

230. In the *Asia Pacific v. DUPONT* cases in the Third Circuit, State of Hawaii, two of plaintiffs' expert witnesses were former long term employees of Monsanto chemical corporation and were about to testify in a Benlate trial on the island of Hawaii, *inter alia*, about the defective nature of Benlate and its harmful effect on plants. DUPONT deliberately obstructed or attempted to obstruct justice, and deliberately tampered with, or attempted to tamper with witnesses, in violation of 18 U.S.C. Sections 1503 and 1512, by sending some of its key agricultural chemical people and others to their counterparts at Monsanto to persuade them to pressure these two witnesses into refusing to testify against DUPONT. DUPONT was, in effect, sanctioned for this conduct, which it did not deny, by not being allowed to depose these two key witnesses prior to trial.

231. In connection with the Costa Rica field tests, as previously mentioned, both Cefalo and Vargas were pressured by DUPONT not to testify, again amounting to obstruction and/or attempted obstruction of justice, and

tampering with witnesses, in violation of 18 U.S.C. Sections 1503 and 1512.

## CONCLUSION

232. When DUPONT's conduct is laid bare, when courts and juries make factual findings and issue sanctions and award punitive damages and DUPONT eventually settles claims, it tries to condition those settlements on agreements that would have the effect of undoing and rewriting history and covering up evidence. DUPONT also unethically attempts to take the lawyers who represent the plaintiffs DUPONT settles with out of the pool of available attorneys for other farmers. On information and belief, DUPONT attempts to condition its agreements to settle such cases on the plaintiffs' acquiescence to joining or not opposing motions to vacate and seal findings of fact, orders, and judgments that could greatly expedite litigation elsewhere, save other courts tremendous time and expense, further the administration of justice and assist farmers in proving their claims. DUPONT does so with the purpose of making each future claimant spend hundreds of thousands of dollars and work for years, in the hope they will be intimidated into dropping their claims, settling cheap or not pursuing the claim at all.

233. As a result of the fact that Defendant illegally concealed and lied about the above-referenced evidence and because of the effect that concealment had in *Bush Ranch* and other cases, Plaintiffs settled their cases for far less than their actual losses.

234. Had Plaintiffs and their attorneys been aware of the above-referenced evidence, Plaintiffs would not have settled their cases as they did, but would have insisted on and received more.

235. As a direct and proximate result of Defendant' conduct, Plaintiffs settled their cases for less than their actual value and agreed to dismiss their Benlate claims. They also have continued to suffer both economically and personally as a result of both the inadequate settlement and Defendant' cover-up of their fraudulent conduct. The cover-up delayed and continues to delay Plaintiffs rightful compensation which has damaged them economically and emotionally. It has caused them to expend considerable additional effort and expense to obtain justice as evidenced by the fact of this Complaint.

236. By their plan, DUPONT and its attorneys made it impossible, unfair, unreasonable and unlawful for the Plaintiffs to tender back the proceeds they received in the fraudulent and illegally gained settlement.

237. After the Plaintiffs settled their case, but before DUPONT was forced to produce the ALTA documents, the BAM documents, and the Costa Rica field test information, the Plaintiffs used the settlement proceeds from DUPONT to pay their attorneys' fees, taxes, Benlate remediation costs, and bank loans.

238. The Plaintiffs' delay in discovering the litigation fraud was caused by DUPONT's continued concealment.

239. DUPONT's continued concealment of the subject information after settling, caused the Plaintiffs to be unable to tender back the settlement proceeds.

240. As Judge Elliott, the United States District Court Judge presiding over the *Bush Ranch* trial and the subsequent hearing on DUPONT's contempt, said in his Order:

> *DuPont's "Releases" Defense.*
>
> We have heretofore noted that while the *Bush Ranch* jury was deliberating the parties reached the agreement on a settlement, and releases were signed. DuPont has contended that these releases bar the parties instituting this show cause proceeding.
>
> Neither the releases nor the pre-release agreement put in evidence by DuPont bar the Court from considering the fraud on the Court alleged in the petition. No agreement between private parties can deprive the Court of its power to conduct an investigation into and rendering rulings on an alleged fraud upon this Court. *See Hazel-Atlas Glass Co. v. Hartsford Empire Co.*, 322 U.S. 238 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946). *See also Glover v. Southern Bell & Telegraph Co.*, 229 Ga. 874, 195 S.E.2d 11 (1972) (release only effective absent fraud). Further, the conduct alleged in the petition and in the memorandum/appendix in support, and the evidence of such conduct heard and seen by this Court, is not conduct "released" by the parties. The language contained in such releases and pre-release agreement does not contain language specifically releasing matters arising from the misconduct alleged. *See U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 27 F.3d 521 (11th Cir. 1994). *See also U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 1004 (11th Cir. 1993).

Thus, the releases signed by the Plaintiffs to settle their products liability suits do not release DUPONT's fraudulent and illegal conduct during the litigation between the parties that induced the Plaintiffs to sign the releases.

241. The Plaintiffs have not waived any cause of action stated hereafter. There is no language of a release document releasing the conduct set forth herein nor does any release state that any representations inducements, promises, or agreements or otherwise, not embodied herein shall be of any force or effect. Simply put, the language of the release does not have a merger clause covering the conduct before the United States District Court which, *inter alia*, supports causes of action in fraudulent misrepresentations, fraudulent concealment, fraudulent nondisclosure of a material fact, fraudulent inducement to settle, and fraud on the court.

FOR A FIRST CLAIM FOR RELIEF

(Fraud)

242. Paragraphs 1 through 241 are incorporated herein by reference.

243. Defendant had scienter or knowledge of the falsity of the representations above-described and knowledge of the fraudulent concealments and non-disclosure of material facts above-mentioned.

244. Defendant had scienter or did knowingly intend to defraud, manipulate and/or deceive plaintiffs, and other Benlate claimants, and to induce plaintiffs' reliance and to induce plaintiffs to act to their detriment and to enter into and sign settlement agreements and to agree to dismiss certain claims relating to use of Benlate.

245. Plaintiffs' herein reasonably relied on the statements, conduct, testimony and/or other representations made by DUPONT and its agents, and reasonably relied on DUPONT and its agents to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by DUPONT's officers and agents. Plaintiffs did so rely and were misled and defrauded and fraudulently induced into settling and dismissing their claims against DUPONT, and have thereby sustained damage and injury in an amount to be shown at trial, an amount exceeding the jurisdictional threshold of this Honorable Court.

246. The above described conduct by Defendant constitutes fraud.

247. As a direct and proximate result of Defendant conduct described herein, Plaintiffs suffered financial losses, including but not limited to settling their cases for substantially less than their true value, extreme emotional distress, lost business opportunities, loss of use of money they should have had, and other damages to be proven at trial.

FOR A SECOND CLAIM FOR RELIEF

(Intentional Nondisclosure of Material Fact)

248. Paragraphs 1 through 247 are incorporated herein by reference.

249. Based upon the above, it is clear that DUPONT intentionally concealed material facts including, but not limited to, the ALTA documents, the BAM documents, and the Costa Rica field test information.

250. The purpose of the intentional concealment was to obtain an advantage in the Plaintiffs' underlying lawsuits and/or to benefit DUPONT in the amount of money to be paid in the settlement of the subject claims.

251. The Plaintiffs' subsequent and proximate actual damages are the difference between the amount which was actually paid on the underlying case and the amount of settlement which should have been paid absent the illegal conduct of DUPONT and its attorneys, the Plaintiffs' extreme emotional distress, the loss of use of money and attorneys' fees. Additionally, the Plaintiffs are entitled to punitive damages.

FOR A THIRD CLAIM FOR RELIEF

(Fraudulent Inducement to Settle)

252. Paragraphs 1 through 251 are incorporated herein by reference.

253. DUPONT misrepresented material facts, including the existence of and/or true contents of the ALTA documents, BAM documents, and the Costa Rica field tests, to the Plaintiffs during the course of settlement of the Plaintiffs' underlying Benlate products liability lawsuits.

254. DUPONT knew or should have known of the existence of and/or true contents of the ALTA documents, BAM documents, and the Costa Rica field tests.

255. DUPONT intended the Plaintiffs rely and act upon the false representations regarding the existence of and/or true contents of the ALTA documents, BAM documents, and the Costa Rica field tests.

256. The Plaintiffs suffered damages as a direct and proximate result of justifiably relying on DUPONT's statements and representations and/or the statements and representations of DUPONT's attorneys as officers of the court.

FOR A FOURTH CLAIM FOR RELIEF

(Fraud on the Court)

(Independent Action Recognized In FRCP Rule 60(b))

257. Paragraphs 1 through 256 are incorporated herein by reference.

258. The Plaintiffs' settlements with DUPONT were induced by fraudulent concealments, nondisclosures and/or fraud upon the Court.

259. The paragraphs of 1 through 270 are realleged here so as to satisfy any requirement of F.R.C.P. Rule 9 in pleading fraud with specificity.

260. The actions described above set forth a deliberately planned and carefully executed scheme to defraud not only the Plaintiffs, but also the United States District Court and the state court of, *inter alia*, Florida and Hawaii.

261. Tampering with the administration of justice in the manner shown herein above involves more than an injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

262. The actions set forth above subverted the integrity of the United States District Court and the state

courts themselves. It was perpetrated by officers of the Court so that the judicial process could not function in its fair and impartial manner.

263. The Plaintiffs herein ask that they be relieved from the settlements in the underlying matters as recognized and allowed in F.R.C.P. Rule 60(b). Specifically, as set forth above, such judgments and settlements were obtained by fraud upon the Court.

264. This action survives all settlements, judgments, proceedings, or orders.

265. The equitable relief requested is that the Plaintiffs be allowed to prove the fraud upon the Court, and as a consequence thereof that the Court order that they be awarded the difference between the settlements received and the settlement values had there been no fraud upon the Court, that sanctions, both in dollars and otherwise, against DUPONT be awarded as the Court shall determine, that attorney's fees be paid, that punitive damages be paid in an appropriate amount, and for such other appropriate relief as the Court shall deem just and proper. It is further requested that a jury be used for the finding of fraud on the court and damages.

FOR FIFTH CLAIM OF RELIEF

(Rescission and Damages for Fraud)

266. Paragraphs 1 through 265 are incorporated herein by reference.

267. The Plaintiffs and the Court were defrauded into approving the settlement received between the Plaintiffs and DUPONT and to dismiss the case.

268. DUPONT and its attorneys hid from the Plaintiffs and the Court scientific evidence establishing the presence of SUs in Benlate (*i.e.*, concealment of the ALTA Lab documents), scientific evidence establishing the presence of Triazine herbicides in Benlate (*i.e.*, the concealment of the BAM documents), and the existence of field testing (*i.e.*, the concealment of Costa Rica Field tests).

269. DUPONT, and its attorneys also presented false testimony from various witnesses, and illegally argued before the Court and juries that DUPONT had complied with all discovery requests with respect to each of these matters.

270. Paragraphs 1 through 265 are realleged here so as to satisfy the requirement of F.R.C.P. Rule 9 in pleading fraud with specificity.

271. The actions of DUPONT, and equities, do not require that there be a tender of benefits by the Plaintiffs in order to rescind and sue in tort for damages.

272. Based upon DUPONT's conduct is delaying the discovery of the fraudulent concealment, the Plaintiffs disbursed the settlement proceeds to pay attorneys fees, taxes, Benlate remediation costs, and bank loans.

273. DUPONT's conduct concealing the subject evidence prevented the Plaintiffs from exercising their judgement as to the terms of the settlement.

274. In fact, under the facts as set forth above, rescission can go to any alleged merger clause in the settlement documents allowing the Plaintiffs to affirm the remainder of the contract and sue for damages for fraud,

as the right to affirm and the right to sue in fraud for damages coexist.

275. The Plaintiffs therefore rescind the settlements and/or any illegal merger clauses therein and sue for fraud as set forth in causes of action above incorporated herein.

FOR A SIXTH CLAIM FOR RELIEF

(Racketeering in violation of 18 U.S.C. Section 1962(c))

276. Paragraphs 1 through 275 are incorporated herein by reference.

277. DUPONT is a "person" within the meaning of 18 U.S.C. Sections 1961(3) and 1964(c).

278. DUPONT, in conjunction with others, formed an "enterprise" within the meaning of 18 U.S.C. Sections 1961(4) and 1962(c), which enterprise was engaged in and the activities of and which affected interstate commerce during the relevant times.

279. The conduct of DUPONT and others with respect to the ALTA documents and data; with respect to the intentional concealment of the BAM and BPM documents, as well as the test results identifying contamination in the Bartlo lots described herein; with respect to the Costa Rica testing; and with respect to the intimidating and impeding of witnesses was all done pursuant to a common scheme, plan and design and as part of a pattern of racketeering activity by DUPONT and others for the purpose of defrauding the Benlate claimants including Plaintiffs herein in order to diminish the value of their claims.

280. The Defendant, ALSTON & BIRD, KIRKPATRICK, GILLEY, DAVID, WOOLARD, OBRIGAWITCH, HADLEY, FRANK, GIBSON, ALBERGO, and BETHEM were each employed by or associated with the enterprise, and did conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity within the meaning of 18 U.S.C. Sections 1961(1)(B) and 1961(E) and 1961(5) and 1962(c), to wit:

a. Multiple acts of mail fraud in violation of 18 U.S.C. Section 1341;

b. Multiple acts of wire fraud in violation of 18 U.S.C. Section 1343; and

c. Multiple acts of obstruction of justice in violation of 18 U.S.C. Section 1503.

d. Multiple acts involving tampering with witnesses in violation of 18 U.S.C. Section 1512,

as set forth above.

281. By reason of the violation of 18 U.S.C. Section 1962 committed by Defendant DUPONT, Plaintiffs sustained damage and injury to their businesses and property in an amount to be shown at trial, an amount exceeding the jurisdictional threshold of this Honorable Court

FOR A SEVENTH CLAIM FOR RELIEF

(Violation of 18 U.S.C. Section 1962(d) by Conspiracy to Violate 18 U.S.C. Section 1962(c))

282. Paragraphs 1 through 281 are incorporated herein be reference.

283. Defendant conspired to violate 18 U.S.C. Section 1962(c). Defendant violated 18 U.S.C. Section 1962(d). By reason of the violation of 18 U.S.C. Section 1962(d) committed by Defendant DUPONT, Plaintiffs sustained damage and injury to their businesses and property in an amount to be shown at trial, an amount far exceeding the jurisdictional threshold of this Honorable Court.

FOR AN EIGHTH CLAIM FOR RELIEF

(Conspiracy)

284. Paragraphs 1 through 283 are incorporated herein by reference.

285. The above-described conduct by Defendant constitutes conspiracy.

286. As a direct and proximate result of Defendant conduct described herein, Plaintiffs suffered financial losses, including but not limited to settling their cases for substantially less than their true value, extreme emotional distress, lost business opportunities, loss of use of money they should have had, and other damages to be proven at trial.

FOR A NINTH CLAIM FOR RELIEF

(Abuse of Process)

287. Paragraphs 1 through 286 are incorporated herein by reference.

288. The above-described conduct by Defendant constitutes abuse of process.

289. As a direct and proximate result of Defendant conduct described herein, Plaintiffs suffered financial losses, including but not limited to settling their cases for substantially less than their true value, extreme emotional distress, lost business opportunities, loss of use of money they should have had, and other damages to be proven at trial.

FOR A TENTH CLAIM FOR RELIEF

(Infliction of Emotional Distress)

290. Paragraphs 1 through 289 are incorporated herein by reference.

291. The above-described conduct by Defendant constitutes negligent and/or intentional infliction of emotional distress, proximately causing Plaintiff Gus Pena to suffer extreme emotional distress.

292. As a direct and proximate result of Defendant conduct described herein, Plaintiffs suffered financial losses, including but not limited to settling their cases for substantially less than their true value, extreme emotional distress, lost business opportunities, loss of use of money they should have had, and other damages to be proven at trial.

FOR AN ELEVENTH CLAIM FOR RELIEF

(Interference with Prospective Economic Advantage)

293. Paragraphs 1 through 292 are incorporated herein by reference.

294. The above-described conduct by Defendant constitutes intentional and/or negligent interference with prospective economic advantage.

295. As a direct and proximate result of Defendant conduct described herein, Plaintiffs suffered financial losses, including but not limited to settling their cases for substantially less than their true value, extreme emotional distress, lost business opportunities, loss of use of money they should have had, and other damages to be proven at trial.

FOR A TWELFTH CLAIM FOR RELIEF

(Spoliation of Evidence)

296. Paragraphs 1 through 295 are incorporated herein by reference.

297. The above-described conduct by Defendant constitutes spoliation of evidence.

298. As a direct and proximate result of Defendant conduct described herein, Plaintiffs suffered financial losses, including but not limited to settling their cases for substantially less than their true value, extreme emotional distress, lost business opportunities, loss of use of money they should have had, and other damages to be proven at trial.

FOR A THIRTEENTH CLAIM FOR RELIEF

(Violation of Florida Deceptive and Unfair Trade Practices Act)

299. Paragraphs 1 through 298 are incorporated herein by reference.

300. The Plaintiffs are consumers in commerce and DUPONT is a corporation carrying on business in the State of Florida, and other States.

301. The Plaintiffs and DUPONT engaged in a public business transaction when the Plaintiffs contracted with DUPONT to purchase Benlate 50 DF and/or Benlate 50 WP and later asserted claims arising from use of Benlate 50 DF and/or Benlate 50 WP.

302. DUPONT blatantly and intentionally employed deceptive and unfair trade practices when it failed to truthfully disclose known defects with Benlate 50 DF and/or Benlate 50 WP, failed to disclose test results related to Benlate 50 DF and/or Benlate 50 WP, fraudulently and deceptively concealed the truth regarding Benlate 50 DF and/or Benlate 50 WP, fraudulently and deceptively conspired to conceal the truth regarding Benlate 50 DF and/or Benlate 50 WP, and/or fraudulently and deceptively concealed test results and field test results.

303. This offensive activity took place within the context of the consumer marketplace, *i.e.*, DUPONT's nationwide sale of Benlate 50 DF and/or Benlate 50 WP.

304. DUPONT's acts and practices as indicated herein were in the conduct of trade and commerce within the public marketplace.

305. DUPONT knew or should have known, that its actions violated the Plaintiffs rights under their contract and its other wrongful actions as factually alleged herein are in violation of the Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. § 501.201 et seq.

306. DUPONT's acts were offensive to the public policy and the public interest in that the acts complained of demonstrate DUPONT's ability to deceive and misrepresent to the public at large facts regarding transactions and contracts affecting commerce.

307. DUPONT's conduct was unscrupulous, unethical, and oppressive. Such conduct directly and indirectly impacts the public interest and has an adverse affect on the public.

308. The acts and practices of DUPONT have potential for repetition in that DUPONT, upon information and belief, continues to conduct business in the State of Florida and may continue to employ such unfair and oppressive tactics.

309. As a direct and proximate result of DUPONT's actions and/or inactions, the Plaintiffs are entitled to treble damages under the Florida Deceptive and Unfair Trade Practices Act.

310. The Plaintiffs' subsequent and proximate damages are the difference between the amount which was actually paid in the settlement of the underlying case and the amount which would have been the fair settlement value of their cases if the Plaintiffs had not been deceived, their extreme emotional distress, the loss of use of money and attorney's fees.

PUNITIVE DAMAGES

311. DUPONT acted wantonly, oppressively, with such malice as implies a spirit of mischief or criminal indifference to civil obligations, and engaged in willful misconduct or with that entire want of care which would

raise the presumption of a conscious indifference to consequences, by clear and convincing evidence warranting the imposition of punitive damages.

312. As a direct and proximate result of Defendant conduct described herein. Plaintiffs suffered financial losses, including but not limited to settling their cases for substantially less than their true value, extreme emotional distress, lost business opportunities, loss of use of money they should have had, and other damages to be proven at trial.

## DEMAND FOR TRIAL BY JURY

313. The Plaintiffs demand their case be heard by a jury on all issues so triable.

WHEREFORE, Plaintiffs Green Leaf Nursery, Inc. and Gus Pena demand judgment against Defendant, jointly and severally, as follows:

a. General damages in an amount to be determined by the jury;

b. Special damages in an amount to be proven at trial;

c. Punitive damages in an amount to be determined by the jury;

d. Treble damages;

e. Equitable relief estopping DUPONT from asserting the releases and orders procured by fraud and/or misrepresentation, or alternatively, such other equitable relief, including recession without the corresponding tender of benefits received, as is deemed appropriate by the Court;

f. Prejudgment interest;

g. Costs of investigation and suit;

h. Attorney's fees; and

i. Such other relief as the Court deems proper.

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October 19, 1998.

Motions for admission *pro hac vice*
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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: 92-20869

GREEN LEAF NURSERY, INC.,
a Florida corporation, and
JOLAYNE D. PENA, an individual,

Plaintiffs,

vs.

E. I. DU PONT DE NEMOURS &
COMPANY, INC., a Delaware
corporation, ASGROW FLORIDA COMPANY,
a Florida corporation and
S&M FARM SUPPLY, a Florida corporation,

Defendants. /

## COMPLAINT AND REQUEST FOR JURY TRIAL

(Filed Sep. 1, 1992)

Plaintiffs, Green Leaf Nursery, Inc., a Florida corporation, and Jolayne D. Pena, an individual, (collectively referred to as "Green Leaf"), sue defendants, E. I. Du Pont DeNemours & Company, Inc. ("Du Pont"), Asgrow Florida Company ("Asgrow") and S&M Farms Supply ("S&M) and state:

## GENERAL ALLEGATIONS

1. This is an action for damages in excess of one Hundred Thousand and 00/100 ($100,000.00) Dollars, exclusive of interest and costs.

2. Plaintiff Green Leaf Nursery, Inc. is a Florida corporation with its principal place of business in Dade County, Florida.

3. Plaintiff Jolayne D. Pena is an individual who resides in Dade County, Florida.

4. Defendant Du Pont is a Delaware corporation, with its principal place of business in Wilmington, Delaware. Du Pont does business and sells products in Dade County, Florida within the meaning of F.S. §48.181 (1992). Du Pont's Agricultural Products – Latin American Division is headquartered in Dade County, Florida. Du Pont is qualified to do business in Florida, has a registered agent in Florida, and maintains an Export Distribution Center in Dade County, Florida. At all relevant times herein, Du Pont was continuously engaged in selling and delivering into the State of Florida fungicides, including a fungicide known and referred to as Benlate 50 DF (hereinafter "Benlate") for the prevention and control of fungi and plant diseases. Du Pont manufactured, sold and delivered into the State of Florida the Benlate which was purchased and used by plaintiffs Green Leaf. This Court has personal jurisdiction over Du Pont pursuant to Fla. Stat. §48.193(2) (1992). Venue is proper in this Court because Du Pont has offices for the transaction of its customary business in Dade County, Florida.

5. Defendant Asgrow is a Florida corporation which is qualified to do business in Florida and which has its principal place of business in Florida. Asgrow is an authorized Benlate distributor for Du Pont. At all relevant times herein, Asgrow was continuously engaged in selling and distributing Benlate in the State of Florida. This Court has personal jurisdiction over Asgrow pursuant to Fla.

Stat. §48.193(2). Venue is proper in this Court because the injury complained of herein occurred in Dade County, Florida.

6. Defendant S&M is a Florida corporation which is qualified to do business in Florida and which has its principal place of business in Princeton, Florida. S&M is an authorized Benlate distributor for Du Pont. At all relevant times herein, S&M was continuously engaged in selling and distributing Benlate in the State of Florida. This Court has personal jurisdiction over S&M pursuant to Fla. Stat. §48.193(2). Venue is proper, in this Court because the injury complained of herein occurred in Dade County, Florida.

7. Benlate is manufactured by or on behalf of Du Pont and distributed throughout the State of Florida by various distributors, suppliers and retailers, including but not limited to Asgrow and S&M. At all relevant times herein, Benlate was intended and recommended by Du Pont for use on nursery plants for the control of various fungal diseases.

8. Plaintiffs Green Leaf were foreseeable users of Benlate.

9. At all times material hereto plaintiffs Green Leaf operated and continue to operate in Homestead, Dade County, Florida, nurseries which grow and sell high quality nursery products and fruit. In addition, plaintiffs own and operate a mango grove facility which grows and sells high quality products.

10. Beginning in 1987, and continuing throughout 1988, 1989, 1990 and early 1991, plaintiffs purchased Benlate, from suppliers in Florida, for use in its nursery

and mango operations. More specifically, plaintiffs commenced purchasing Benlate from Asgrow and S&M in Florida in 1987 and continuing each year thereafter through early 1991. Plaintiffs used the Benlate so purchased in their nursery and mango groves operations in Dade County, Florida during the years 1987, 1988, 1989, 1990 and 1991.

11. Before and during the time periods set forth in paragraph 10 above, Du Pont sold and delivered to Asgrow and S&M in Florida the Benlate which was purchased from Asgrow and S&M by plaintiffs.

12. The Benlate purchased by plaintiffs was either contaminated with one or more herbicides, incompatible fungicides, or other chemicals toxic to plants, or was defectively designed, or both when it was sold by Du Pont and left Du Pont's exclusive care, custody and control. The Benlate purchased and used by plaintiffs, which was manufactured, distributed, and/or sold by defendants, was defective in that it damaged or destroyed and otherwise rendered unsaleable plaintiffs' nursery and mango products on which it was used.

13. Commencing in 1987, and continuing through 1988, 1989, 1990, and early 1991, plaintiffs applied the Benlate which they had purchased on the plants at their nurseries and mango groves. These applications of Benlate by plaintiffs were done according to Du Pont's written instructions and specification supplied with the Benlate, and were in accordance with generally accepted practices for the control of fungi and plant diseases.

14. Beginning in 1987, plaintiffs began to experience problems with their plants and trees. The plants and trees turned yellow, growth was stunted, deformities occurred,

and root mass was killed. In addition, plant and tree death occurred. These problems continued throughout 1988, 1989, 1990 and 1991, and continue through the present.

15. As a result of the effects of Benlate on its plant material, nursery facilities and mango groves, plaintiffs have suffered the following losses: (a) loss of plant material in 1987, 1988, 1989, 1990, 1991, and 1992; (b) loss of fruit production, loss of fruit and loss of material in 1987, 1988, 1989, 1990, 1991, and 1992; (c) loss of value of plant and tree material in 1987, 1988, 1989, 1990, 1991, and 1992; (d) loss of production in 1987, 1988, 1989, 1990, 1991, and 1992 due to retarded growth rate and plant death or injury; (e) loss of plant and tree material, loss of value of plant material and loss of production in future years due to the injury to, and destruction of, plaintiff's present inventory and facilities; (f) increased costs associated with production, including but not limited to increased fertilizer, chemical and labor costs; (g) costs of disposal and decontamination of nursery facilities; (h) loss of past and future profits; and (i) loss of business goodwill and damage to reputation.

16. Plaintiffs have always had a reputation for growing and producing high quality foliage plants and fruit. The defective Benlate reduced the quality of the plant material and fruit grown and produced by plaintiffs, severely damaging plaintiffs' reputation as quality growers.

17. In September 1989, the U.S. Environmental Protection Agency ("EPA") ordered Du Pont to stop the distribution and sale of Benlate and to recall Benlate because of contamination with the herbicide atrazine.

18. In September 1989, Du Pont represented to the EPA that atrazine in quantities less than 100 parts per million in Benlate would not cause the problems associated with Benlate.

19. Defendant Du Pont recommenced distribution and sale of Benlate in 1989, representing that the problems with Benlate had been solved.

20. In March 1991, Du Pont again recalled Benlate pursuant to an EPA order because of adulteration of the product which continued to stunt plant growth.

21. During the time they distributed and/or sold Benlate, defendants omitted any statement or notice to purchasers of Benlate that the Benlate was defective and stunted plant and tree growth. Defendants also failed to disclose that Benlate destroyed or otherwise harmed plants, trees, fruits or other vegetation.

## COUNT I
## STRICT LIABILITY

22. The allegations contained in paragraphs 1 through 21 are realleged and incorporated herein by reference.

23. Defendants are sellers engaged in the business of selling Benlate.

24. Defendants placed Benlate on the market with knowledge that it would be used by purchasers without inspection for defects and that purchasers would rely on defendants for quality control of the product.

25. Defendants produced and/or sold Benlate in a defective and unreasonably dangerous condition, which

resulted in plants, trees and fruits which were exposed to it being damaged or destroyed and unsaleable.

26. The Benlate manufactured and/or sold by defendants was expected to reach, and in fact reached, plaintiffs without any substantial change in its condition after being manufactured and/or sold by defendants.

27. As a direct and proximate result of the defective Benlate, plaintiffs incurred damage to its products and general and special damages as follows, in addition to and including those damages alleged in paragraph 15:

a. Plaintiffs suffered damage to their property, their businesses and incurred various business losses, including without limitation loss of value, loss of production, loss of business, and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter a judgment against defendants for general and special damages, prejudgment interest, costs, and all other relief allowable under law and requests trial by jury on all issues so triable.

## COUNT II
## NEGLIGENCE

28. The allegations contained in paragraphs 1 through 21 are realleged and incorporated herein by reference.

29. Defendants had a duty to exercise reasonable care in the manufacture, distribution and/or sale of Benlate, both as to themselves individually and with regard to others acting on behalf of each, so as to render the Benlate free from defects and contamination and to make it reasonably safe for its foreseeable usage and users.

30. Defendants breached said duty by committing one or more of the following negligent acts of commission and/or omission:

a. Defendants manufactured, distributed, and/or sold Benlate in a defective condition which resulted in plants, trees and fruits which were exposed to it being damaged or destroyed and unsaleable;

b. Defendants, by and through their agents, servants and/or employees acting within the course and scope of their employment, negligently and carelessly manufactured and distributed, and/or sold Benlate in an inherently dangerous or defective condition;

c. Defendants negligently and carelessly failed to take all necessary precautions to ensure that the Benlate manufactured and sold to plaintiffs would not be contaminated or contain a design defect detrimental to plaintiffs' nursery products and mango groves;

d. Defendants negligently and carelessly failed to adequately inspect, examine, test and analyze the Benlate and therefore failed to discover its defective condition before it was placed on the market for sale to the public, including plaintiffs;

e. Du Pont negligently and carelessly failed to manufacture Benlate in a substantially safe manner and/or

failed to implement proper quality controls and other controls to ensure that the Benlate was adequate and suitable for its intended use;

f. Defendants knew or in the exercise of reasonable care should have known of the existence of the defective condition of the Benlate before defendants placed it on the market for sale to the public, including plaintiffs.

g. Defendants failed to warn plaintiffs of said defective conditions or, in the alternative, allowed said conditions to exist for a length of time sufficient for a reasonable inspection by defendants to have disclosed same; and

h. Defendants failed to remove Benlate from the market when they knew, or reasonably should have known of the presence of either contamination or a design defect, or both, therein.

31. Defendants knew, or should have known, of the defective condition of the Benlate and the damage it would cause upon its use.

32. As a direct and proximate result of defendants' negligence, plaintiffs suffered damage to their products and general and special damages as follows, in addition to and including those damages alleged in paragraph 15:

a. Plaintiffs suffered damage to their property, their businesses and incurred various business losses, including without limitation loss of value, loss of production, loss of business, and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter judgment against defendants for general and special damages, prejudgment interest, costs, and all other relief allowable under law and requests trial by jury on all issues so triable.

**COUNT III**
**BREACH OF IMPLIED WARRANTY OF**
**FITNESS FOR A PARTICULAR PURPOSE**
**(AGAINST ASGROW ONLY)**

33. The allegations contained in paragraphs 1 through 21 are realleged and incorporated herein by reference.

34. Defendant Asgrow warranted that Benlate was reasonably fit for its intended use as a fungicide.

35. Defendant Asgrow, at the time it sold Benlate, had reason to know of the particular purpose for which Benlate was sold and would be used by a purchaser, including plaintiffs.

36. At the times it purchased and used Benlate, plaintiffs relied on Asgrow's skill and judgment in providing a suitable, nondefective product.

37. Plaintiffs notified Asgrow of its breach of its implied warranty by informing Asgrow that the Benlate had caused damage to plaintiffs' nursery stock and mango groves while being used for its intended purpose.

38. As a direct and proximate result of Asgrow's breach of its implied warranty of fitness for a particular

purpose, plaintiffs incurred damages to their products and general and special damages as follows, in addition to and including those damages alleged in paragraph 15:

a. Plaintiffs suffered damage to their property, their businesses and incurred various business losses, including without limitation loss of value, loss of production, loss of business, and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter a judgment against defendant Asgrow for general and special damages, prejudgment interest, costs, and all other relief allowed under law and requests trial by jury on all issues so triable.

**COUNT IV**
**BREACH OF IMPLIED WARRANTY OF**
**FITNESS FOR A PARTICULAR PURPOSE**
**(AGAINST S&M ONLY)**

39. The allegations contained in paragraphs 1 through 21 are realleged and incorporated herein by reference.

40. Defendant S&M warranted that Benlate was reasonably fit for its intended use as a fungicide.

41. Defendant S&M, at the time it sold Benlate, had reason to know of the particular purpose for which Benlate was sold and would be used by a purchaser, including plaintiffs.

42. At the times they purchased and used Benlate, plaintiffs relied on S&M's skill and judgment in providing a suitable, nondefective product.

43. Plaintiffs notified S&M of its breach of its implied warranty by informing S&M that the Benlate had caused damage to plaintiffs' nursery and mango groves while being used for its intended purpose.

44. As a direct and proximate result of S&M's breach of its implied warranty of fitness for a particular purpose, plaintiffs incurred damages to the products and general and special damages as follows, in addition to and including those damages alleged in paragraph 15:

a. Plaintiffs suffered damage to their property, their businesses and incurred various business losses, including without limitation loss of value, loss of production, loss of business, loss of property and material located on the property, and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter judgment against defendant S&M for general and special damages, prejudgment interest, costs, and all other relief allowable under law and requests trial by jury on all issues so triable.

**COUNT V**
**EXPRESS WARRANTY**
**(AGAINST ASGROW ONLY)**

45. The allegations contained in paragraphs 1 through 21 are realleged and incorporated herein by reference.

46. Defendant Asgrow at the time it sold Benlate, made representations that Benlate was fit and suitable for use as a fungicide and omitted any statement that Benlate was defective so as to harm plants, trees or fruits to which it was applied by destroying them or stunting their growth.

47. Defendant Asgrow expressly warranted that the Benlate purchased by plaintiffs conformed to its chemical description and was fit for its intended use as a fungicide.

48. Defendant Asgrow breached this warranty because, at the times plaintiffs purchased Benlate, the product did not conform to its chemical description and/or was not reasonably fit for its intended use as a fungicide.

49. Plaintiffs notified Asgrow of the breach by informing Asgrow that the Benlate had caused damage to plaintiffs' property.

50. As a direct and proximate result of Asgrow's breach of express warranty, plaintiffs incurred damages to their products and general and special damages as follows, in addition to and including those damages alleged on [sic] paragraph 15:

a. Plaintiffs suffered damage to their businesses and incurred various business losses, including without

limitation loss of value, loss of production, loss of business, and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter a judgment against defendant Asgrow for general and special damages, prejudgment interest, costs, and all other relief allowable under law and requests trial by jury on all issues so triable.

**COUNT VI**
**EXPRESS WARRANTY**
**(AGAINST S&M)**

51. The allegations contained in paragraphs 1 through 21 are realleged and reincorporated herein by reference.

52. Defendant S&M, at the time it sold Benlate, made representations that Benlate was fit and suitable for use as a fungicide and omitted any statements that Benlate was defective so as to harm plants and trees to which it was applied by destroying them or stunting their growth.

53. Defendant S&M expressly warranted that the Benlate purchased by plaintiffs conformed to its chemical description and was fit for its intended use as a fungicide.

54. Defendant S&M breached this warranty because, at the times plaintiffs purchased Benlate, the product did not conform to its chemical description and/or was not reasonably fit for its intended use as a fungicide.

55. Plaintiffs notified S&M of the breach by informing S&M that the Benlate had caused damage to plaintiffs' property.

56. As a direct and proximate result of S&M's breach of express warranty, plaintiffs incurred damages to their products and general and special damages as follows, in addition to and including those damages alleged on [sic] paragraph 15:

a. Plaintiffs suffered damages to their property, their businesses and incurred various business losses, including without limitation loss of value, loss of production, loss of business, loss of its property and material located on the property, and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter a judgment against defendant S&M for general and special damages, prejudgment interest, costs, and all other relief allowable under law and requests a trial by jury on all issues so triable.

**COUNT VII**
**IMPLIED WARRANT OF MERCHANTABILITY**
**(AGAINST ASGROW ONLY)**

57. The allegations contained in paragraphs 1 through 21 are realleged and incorporated herein by reference.

58. Defendant Asgrow is a merchant as a result of its sale of Benlate to consumers including plaintiffs.

59. Defendant Asgrow sold Benlate as fit for the ordinary purposes for which such product is manufactured, distributed and used.

60. Plaintiffs notified Asgrow of the breach of Asgrow's implied warranty of merchantability by informing Asgrow that the Benlate plaintiffs purchased and used had caused damage to their plants and mango groves.

61. As a direct and proximate result of Asgrow's breach of implied warranty of merchantability, plaintiffs incurred damages to their products and general and special damages as follows, in addition to and including those damages alleged in paragraph 15:

a. Plaintiffs suffered damage to their property, their businesses and incurred various business losses, including without limitation loss of value, loss of production, loss of business, and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter judgment against defendant Asgrow for general and special damages, prejudgment interest, costs, and all other relief allowable under law and requests trial by jury on all issues so triable.

**COUNT VIII**
**IMPLIED WARRANTY OF MERCHANTABILITY**
**(AGAINST S&M ONLY)**

62. The allegations contained in paragraphs 1 through 21 are realleged and incorporated herein by reference.

63. Defendant S&M is a merchant as a result of its sale of Benlate to consumers including plaintiffs.

64. Defendant S&M sold Benlate as fit for the ordinary purposes for which such product is manufactured, distributed and used.

65. Plaintiffs notified S&M of the breach of S&M's implied warranty of merchantability by informing S&M that the Benlate plaintiffs purchased and used had cause damage to their plants and trees.

66. As a direct and proximate result of S&M's breach of implied warranty of merchantability, plaintiffs incurred damages to their products and general and special damages as follows, in addition to and including those damages alleged in paragraph 15:

a. Plaintiffs suffered damage to their property, their businesses, and incurred various business losses, including without limitation loss of value, loss of production, loss of business, loss of property and material located on their property and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter judgment against defendant S&M for general and special damages, prejudgment interest, costs, and all other relief allowable under law and requests trial by jury on all issues so triable.

**COUNT IX**
**ACTUAL FRAUD**
**(AGAINST Du Pont ONLY)**

67. The allegations contained in paragraphs 1 through 21 are realleged and incorporated herein by reference.

68. Prior to the September 1989 recall, Du Pont knew that Benlate was defective and despite this superior knowledge, knowingly continued to advertise, distribute, and sell Benlate as fit for its intended use without disclosure of Benlate's defects.

69. Defendant Du Pont took the public position that the September 1989 recall was due to an atrazine problem which it had addressed. Du Pont knew at the time that the problems associated with Benlate were not solely due to atrazine, so that the product itself was otherwise defective. In September 1989, Du Pont stated to the EPA that atrazine in quantities less than 100 parts per million in Benlate would not cause the problems associated with Benlate and, despite this superior knowledge, knowingly continued to advertise, distribute, and sell Benlate as fit for its intended use without disclosure of the existence of other defects causing the problems associated with Benlate.

70. Thereafter, Du Pont made false statements concerning the fitness of Benlate and omitted disclosure of the continued defects in the Benlate.

71. Defendant Du Pont knew that its representations concerning the fitness of Benlate were false.

72. Defendant Du Pont, based on its superior knowledge, knew that it was making misrepresentations and omissions of material fact concerning the defectiveness of Benlate.

73. Defendant Du Pont made these false statements and omissions with the intention of inducing purchasers and users, such as plaintiffs, to purchase and use Benlate to its detriment.

74. As a direct and proximate result of plaintiffs' purchase and use of Benlate in reasonable and/or justifiable reliance on DuPont's false statements and omissions, plaintiffs incurred damages to their products and general and special damages to their products and general and special damages as follows, in addition to and including those damages alleged in paragraph 15:

a. Plaintiffs suffered damage to their property, their businesses and incurred various business losses, including without limitation, loss of value, loss of production, loss of business, and costs of disposal and decontamination;

b. Plaintiffs lost past and future profits; and

c. Plaintiffs incurred loss of goodwill, damage to their reputation, and damage to their credit ratings.

WHEREFORE, plaintiffs request that this Honorable Court enter judgment against defendant Du Pont for general and special damages, prejudgment interest, costs, and all other relief allowable under law and request trial by jury on all issues so triable.

Respectfully submitted,

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By: PHILLIP J. SHEEHE, ESQ.
Florida Bar Number 259128
LOUIS V. VENDITTELLI
Florida Bar Number 187370

/s/ Phillip J. Sheehe

Dated: September 14, 1992

## RELEASE, INDEMNITY AND ASSIGNMENT

This Release, Indemnity and Assignment (hereinafter "Release") is executed by Plaintiff, Green Leaf Nursery, Inc., a Florida corporation, on his (their) own behalf, and on behalf of his (their) agents, attorneys, successors, partners, partnerships, assigns, heirs, executors, administrators, insurers, and anyone claiming by, through, or under any or all of them (hereinafter collectively "Plaintiff") to inure to the benefit of E.I. Du Pont de Menours & Company, Inc. ("Du Pont"), its successors and assigns; present and former subsidiaries, affiliates, insurers, agents, servants, distributors, retailers, formulators, employees, consultants, officers, directors, stockholders, representatives and attorneys; and all other firms, corporations, business entities, or persons associated with Du Pont (hereinafter collectively "Defendant").

## WITNESSETH:

**WHEREAS**, Plaintiff has filed suit against Defendant in the civil action identified on Exhibit 1 attached hereto (the "Action") in which Plaintiff has alleged against Defendant various claims related to Plaintiff's purchase and/or use of Benlate fungicide;

**WHEREAS**, Defendant has denied the aforementioned allegations;

**WHEREAS**, Plaintiff desires to terminate said litigation, to release and dispose of all claims against Defendant and all claims incident thereto against Defendant, thereby finally disposing of the same, and to give assurance that Plaintiff will not hereafter prosecute such claims or cause them to be prosecuted;

NOW, THEREFORE, in consideration of good and valuable consideration, receipt of which is hereby acknowledged, and intending to be legally bound hereby, the Plaintiff agrees as follows:

1. In consideration of Defendant's payment of the amount set forth in the authorization previously signed by Plaintiff, Plaintiff hereby releases Defendant from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Plaintiff ever had, now has, or may hereafter have against Defendant, by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed (including, but not limited to, the claims asserted and sought to be asserted in the Action).

2. Plaintiff understands that this Release also includes, but is not limited to, all of Plaintiff's claims for costs, expenses, and attorney's fees, taxable or otherwise, incurred in or arising out of prosecution of the Action.

3. Plaintiff covenants that Plaintiff will not commence, prosecute, or permit to be commenced or prosecuted against Defendant any action or other proceeding based upon or in any way related to any causes of action, claims, demands, actions, obligations, damages, or liabilities which are the subject of this Release.

4. Plaintiff warrants that no other person had, has, or claims any interest in the causes of action, claims, demands, actions, obligations, damages or liabilities described in paragraph 1 hereof; that Plaintiff has the sole right and exclusive authority to execute this Release and to receive the consideration paid therefor; and that Plaintiff has not sold, assigned, transferred, conveyed or otherwise

disposed of any cause of action, claim, demand, action, obligation, damage or liability covered hereby.

5. Plaintiff will indemnify and hold Defendant harmless from and against any and all claims. including all claims for court costs and attorneys' fees, asserted against Defendant, contrary to the provisions of this Release, as a result of or in connection with any action or other proceeding brought by or prosecuted for the benefit of Plaintiff, or by any person making a claim by, through or under Plaintiff or as a result of any sale, assignment, transfer, conveyance or other disposition of Plaintiff's claims. A claim shall be deemed to have accrued under this agreement of indemnity immediately upon the commencement of any such action or other proceeding, and in such event, this Release may be pleaded as a full and complete defense thereto, as the basis for an abatement of or injunction against said action or other proceedings, and as the basis of a counterclaim or cross-claim for damages therein.

6. In the event that any such claims described in Paragraph 5 above shall accrue, and under the aforesaid agreement of indemnity, Defendant shall be entitled to recover from Plaintiff, its successors and assigns, not only the amount of any judgment which may be awarded against Defendant, but also court costs, attorney's fees, and all other costs and expenses, taxable or otherwise, in preparing the defense of, defending against, seeking or obtaining an abatement of or injunction against such action, or in prosecuting any counterclaim or crossclaim based thereon.

7. Plaintiff assigns to Defendant any and all causes of action, claims, demands, actions, obligations, damages, or liabilities that are the subject of this Release.

8. Plaintiff represents and warrants that Plaintiff will not participate in any action of any kind by any person against Defendant; that Plaintiff will not solicit, counsel, advise, suggest, assist or encourage any causes of action, claims, demands, actions or rights of any kind of other persons against Defendant; that Plaintiff will not testify or otherwise provide evidence in any investigation, hearing or trial of any such action, except under subpoena; and that, in the event of the issuance of such a subpoena, Plaintiff will immediately notify Howard J. Rudge, General Counsel, Du Pont Legal Department, Wilmington, Delaware, or his successor.

9. Plaintiff represents and warrants that Plaintiff understands that Defendant admits no liability, guilt or wrongdoing, such being expressly denied.

10. Plaintiff represents and warrants that he has (they have) been fully advised by his attorney or attorneys concerning the execution of this Release, that he has (they have) fully read and fully understands the terms of this Release, and that he has (they have) freely and voluntarily executed this Release.

11. Except to the extent Plaintiff is required to disclose the terms of this Release to taxing authorities or others in connection with Plaintiff's business or tax affairs (which disclosure shall be made, to the extent reasonably possible, on a confidential basis), Plaintiff shall maintain the confidentiality of the terms of this Release.

12. Immediately following payment to Sheehe & Vendittelli, P.A., counsel for Plaintiff, of the amount set forth in the Authorization previously signed by Plaintiff, Plaintiff authorizes Sheehe & Vendittelli, P.A., counsel for Plaintiff, to execute and furnish to Defendant for filing in the Action such pleadings as may be necessary to dismiss all claims set forth in the Action with prejudice, each party to bear its own costs and attorney's fees.

13. This Release shall bind and inure to the benefit of all successors and assigns of Plaintiff. It shall inure to the benefit of Defendant, its successors and assigns; all present and former subsidiaries, affiliate, insurers, agents, servants, employees, consultants, officers, directors, stockholders, representatives and attorneys; and all other firms, corporations, business entities, or persons associated with Defendant.

14. This document embodies the entire terms and conditions of the Release described herein. All words, phrases, sentences, and paragraphs, including the recitals hereto, are material to the execution hereof. All executed copies are duplicate originals, equally admissible in evidence.

15. This Release shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of law provisions thereof.

16. It is agreed that the effective date of this Release is May 25, 1994.

**PLAINTIFF**

Witnesses:
/s/ [Illegible]
/s/ [Illegible]

Green Leaf Nursery, Inc., a Florida corporation

/s/ George A. Pena
George A. Pena,
President
Address: 19355 S.W. 304 Street
Homestead, FL 33030

**ACKNOWLEDGEMENT**

STATE OF FLORIDA )
) SS:
COUNTY OF DADE )

Before me, a Notary Public in the aforesaid County and State, personally appeared the above-named George A. Pena, President of Green Leaf Nursery, Inc., a Florida corporation, who acknowledged execution of the foregoing Release, Indemnity and Assignment as said person's free act and deed.

Witness my hand and notarial seal this 25 day of May, 1994.

/s/ Vivian Rodriguez
Vivian Rodriguez,
Notary Public
Residing in Dade County

My Commission Expires:
OFFICIAL NOTARY SEAL
VIVIAN RODRIGUEZ
[ILLEGIBLE]

EXHIBIT ONE

GREEN LEAF NURSERY, INC., a Florida corporation, and JOLAYNE D. PENA, an individual,

vs. E. I. DU PONT DE NEMOURS & COMPANY, INC.; a Delaware corporation, ASGROW FLORIDA COMPANY, a Florida corporation and S&M FARM SUPPLY, a Florida corporation,

Dade County Circuit Court Case No. 92-20069 (21)

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(2)

No. 03-1050

Supreme Court, U.S.
FILED
APR 2 - 2004
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

GREEN LEAF NURSERY, INC. and GEORGE A. PENA,

*Petitioners,*

*v.*

E.I. DU PONT DE NEMOURS AND COMPANY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly construed a choice-of-law clause in a settlement to apply only to the scope and effect of the settlement, and not to require the application of Delaware law to determine the elements of tort claims, where the clause provided only that the settlement would be "governed and construed in accordance with" Delaware law.

2. Whether the Court of Appeals properly applied the requirement under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), of a "direct relation between the injury asserted and the injurious conduct alleged" in ruling that Petitioners could not pursue RICO claims for indirect injury resulting from their alleged "monitoring" of litigation misconduct in a case to which they were not parties.

3. Whether the Court of Appeals properly ruled that Petitioners had not been injured "by reason of" alleged predicate acts of mail and wire fraud, as required by the RICO statute, when the face of the parties' pleadings showed that Petitioners were aware of Respondent's alleged misrepresentations but did not reasonably rely and could not have reasonably relied on them.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company, and no publicly held company owns 10% or more of DuPont's stock. It is a publicly traded corporation listed on the New York Stock Exchange.

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## INTRODUCTION

In this case, the Court of Appeals affirmed, in a lengthy decision, two extensive opinions of the District Court dismissing all of Petitioners' so-called "settlement fraud" claims. This decision involves straightforward issues of contractual construction under state law; settled rules of Florida state law; and the unremarkable application of this Court's rulings regarding RICO's proximate cause requirement. As with the prior dismissal of "settlement fraud" claims brought by similarly-situated plaintiffs, none of the issues raised by Petitioners warrants this Court's review. *See Kobatake v. DuPont*, 162 F.3d 619 (11th Cir. 1998), *cert. denied*, 528 U.S. 921 (1999).

As to the state law claims, contrary to Petitioners' assertions, the Eleventh Circuit's choice-of-law ruling reflects the application of settled Florida conflicts rules. The decision below embraced, rather than rejected, Florida Supreme Court decisions regarding both the effect of the choice-of-law clause in Petitioners' settlement agreements and the state law supplying the elements of their tort claims. The Florida Supreme Court decision that Petitioners say was disregarded did not deal at all with the choice of law applicable to the tort claims, as both the District Court and the Court of Appeals held (see Statement of the Case §§ 2(a), 3(a) & (b)). The opinion below applied settled substantive rules of Florida state law – including a decision answering a prior certified question – in upholding the dismissal of Petitioners' claims. The Court of Appeals' application of Florida state law principles does not warrant certiorari and, in any event, is manifestly correct.

Petitioner's alleged "circuit splits" regarding the Court of Appeals' RICO rulings parrot arguments raised in several petitions recently denied by this Court. *See Lerner v. Fleet Bank,*

*N.A.*, 124 S. Ct. 532 (2003) (denying certiorari); *Sandwich Chef of Texas, Inc. v. Reliance National Indem. Ins. Co.*, 124 S. Ct. 101 (2003) (same); *Summit Properties, Inc. v. Hoechst-Celanese Corp.*, 531 U.S. 1132 (2001) (same). These alleged "conflicts" are illusory and turn on the varying facts of the cases. They provide no reason for this Court's review. In the end, Petitioners' RICO claims required nothing more than the straightforward application of settled proximate cause rules to the particular facts of this case.

Thus, this case presents no issues warranting this Court's review. The Petition for Writ of Certiorari should be denied.

## STATEMENT OF THE CASE

These appeals arose from orders granting Respondent's motions for judgment on the pleadings, in which Petitioners' factual allegations were assumed to be true. Respondent therefore does not dispute, for present purposes, the Petitioners' discussion of the underlying facts giving rise to the parties' current dispute. However, Petitioners discussion of the prior proceedings in related "settlement fraud" cases and the cases below is misleading and calls for correction.

1. Petitioners mischaracterize the extensive proceedings in this case (and in related cases) leading up to the decision below.

a. This is one of a number of "settlement fraud" cases filed in or removed to the United States District Court for the Southern District of Florida on diversity grounds. Under basic *Erie* principles, the conflicts rules of the forum (Florida) apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

b. Consistent with *Klaxon*, in a prior appeal arising from a related case, the Court of Appeals had certified state law issues to the Florida Supreme Court. *See Mazzoni Farms, Inc. v. DuPont*, 166 F.3d 1162 (11th Cir. 1999). Specifically, the Eleventh Circuit asked whether a choice-of-law clause such as contained in Petitioners' settlement agreement – which provided that the settlements would be "governed and construed in accordance with" Delaware law – was enforceable in the face of a fraud claim. Pet. App. 233. The Florida Supreme Court ruled that the choice-of-law clause was enforceable and thus held that Delaware law governed the contractual issue of whether the release provision barred claims of fraudulent inducement. *Mazzoni Farms, Inc. v. DuPont*, 761 So. 2d 306, 310-313 (Fla. 2000). Nothing in the Florida Supreme Court's decision, however, purported to determine the law that would govern the fraud claim itself (or the other tort claims insofar as they were not precluded by the settlement).

Petitioners claim that the Florida Supreme Court adopted the approach of the *Restatement (Second) of Conflicts of Laws* §§ 187 & 201 (1979). Pet. 10. Those sections address whether a choice-of-law clause governs a claim to rescind or avoid the entire contract containing the clause. *Id.* The Florida Supreme Court, however, specifically refused to address this issue on the ground that the plaintiffs in *Mazzoni Farms* – like the Petitioners here – had elected to keep the settlement proceeds and thereby "affirm" their contracts (rather than rescind them):

> It is axiomatic that fraudulent inducement renders a contract voidable, not void. Consistent with the majority view, Florida law provides for an election of remedies in fraudulent inducement cases: rescission, whereby the party repudiates the transaction, or damages, whereby the party ratifies

> the contract. A prerequisite to rescission is placing the other party in status quo. . . . Moreover, a party's right to rescind is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission.
>
> A damages claim, by contrast, affirms the contract, and thus ratifies the terms of the agreement. This principle ensures that a party who "accepts the proceeds and benefits of a contract" remains subject to "the burdens the contract places upon him."
>
> As previously stated, the necessary precondition for rescission is tender of the benefits received under the contract. In effect, the nurseries elected to affirm the contract by not returning the settlement proceeds. As a result, they are bound by the terms of the contract, including the choice-of- law provision

761 So. 2d at 313 (citations and footnote omitted). In a footnote, the Florida Supreme Court specifically declined to decide whether to adopt the *Restatement*'s rule regarding the applicability of a choice-of-law clause to a rescission claim:

> We reiterate that because the nurseries have elected to affirm the contract, we do not have the occasion to consider whether the choice-of-law provision would remain operative if they had instead sought rescission.

*Id.* at 313 n.7. Thus, contrary to Petitioners' assertions, there is no "specific invocation of *Restatement* section 201" in the *Mazzoni Farms* decision (Pet. 11), but rather an express refusal by the Florida Supreme Court to reach the *Restatement* issue. Moreover, as developed below, the entire *Restatement* debate

is irrelevant, because the Florida Supreme Court was addressing contractual interpretation issues, not the substantive tort issues that are the subject of the Eleventh Circuit's rulings.

c. When the Eleventh Circuit certified the conflicts issues to the Florida Supreme Court, it recognized that the issue of the interpretation of the contractual settlement agreement under Delaware law might need to be certified to the Delaware Supreme Court. *See Mazzoni Farms*, 166 F.3d at 1165. Three months after the Court of Appeals certified the conflicts issue to the Florida Supreme Court, the District Court certified the contractual construction issue to the Delaware Supreme Court.

Specifically, the District Court certified to the Delaware Supreme Court the contractual interpretation question of whether the Petitioners' "settlement fraud" claims were barred by the release clause in their settlement agreement, in which they released Respondent from "any and all . . . claims . . . whether known or unknown . . . by reason of any fact or matter whatsoever." *See DuPont v. Florida Evergreen Foliage*, 744 A.2d 457, 459 (Del. 1999). The Delaware Supreme Court held that the release did not bar claims of fraudulent inducement of the settlement agreement and therefore did not preclude Petitioners' tort action at the outset. *Id.* at 462.

Contrary to Petitioners' claim (Pet. 6), the Delaware Supreme Court, having held that the settlement agreement did not foreclose the tort action, did not purport to require the application of Delaware law to the elements of the Petitioners' fraud claims. The District Court only asked, and the Delaware Supreme Court only addressed, a specific contractual interpretation issue of Delaware law: the scope and effect of the release clause with respect to a claim of fraud. *DuPont v.*

*Florida Evergreen Foliage*, 744 A.2d at 459-462. All parties here agreed that this narrow issue fell within the choice-of-law clause in the settlement agreement.

d. Thus, at the time Respondent filed the motions giving rise to the decisions below, the Florida Supreme Court had ruled as a matter of Florida conflicts law that Delaware law governed the contractual interpretation issue, and the Delaware Supreme Court had ruled (as a matter of Delaware contract law based on the facts alleged) that the release did not bar the claims. These rulings allowed Petitioners' claims to proceed past the initial hurdle of the release. They did not purport to dictate the substantive law applicable to the fraud and tort claims Petitioners were asserting or announce the conflicts analysis that would apply to these claims.

2. Petitioners compound their erroneous descriptions of the prior proceedings by mischaracterizing the District Court decisions in this case.

a. Because the Florida Supreme Court did not address the ***scope*** of the choice-of-law clause (an issue that had not been certified by Eleventh Circuit), that issue remained undetermined when the Court of Appeals remanded the case to the District Court. The first portion of the District Court's initial dispositive order, therefore, conducted the necessary analysis of the scope of the choice-of-law clause:

> [T]he decisions by the Supreme Court of Florida and Supreme Court of Delaware were limited to interpreting the construction and effect of the release and choice of law language. Neither opinion focused upon what substantive law should be applied to the plaintiffs' tort claims, assuming they were permitted to go forward. . . . Furthermore, the

> language in the release, upon a plain reading by the Court, is not broad enough to encompass tort claims. . . . The tort claims shall therefore be interpreted under Florida law.

Pet. App. 42-43 (citations omitted).

b. In an effort to bolster their argument that the Court of Appeals should have certified the substantive tort issues to the Florida Supreme Court, Petitioners claim that the District Court ruled "that certification of the state law issues to the Florida Supreme Court was probably warranted." Pet. 15. In the District Court's certification ruling (Pet. App. 83-84), there is not so much as a word that remotely could be construed as a finding by the District Court that certification of the state law issues was warranted. To the contrary, the trial court merely found, as required to certify the decision for interlocutory appeal under 28 U.S.C. § 1292(b), that "[r]easonable jurists could disagree with this Court's interpretation of the Florida and Eleventh Circuit precedent regarding litigation conduct and reasonable reliance. . . ." *Id.* Merely because the District Court held that its interpretation of state law issues should be reviewed on an interlocutory appeal in no way mandates that the Court of Appeals exercise its discretion to certify those issues to the Florida Supreme Court.

3. Petitioners likewise mischaracterize the Court of Appeals' decision.

a. Petitioners assert that the Court of Appeals "deliberately ignored the choice of law provision in the settlement contract." Pet. 7. As with the District Court, however, the Eleventh Circuit

began its substantive analysis with an examination of the scope of the choice-of-law clause:

> The choice-of-law clause provides that "[t]his release shall be governed and construed in accordance with the laws of the State of Delaware. . . ." The effect of this clause is narrow in that only the release itself is to be construed in accordance with the laws of the State of Delaware. The clause does not refer to related tort claims or to any and all claims or disputes arising out of settlement or arising out of the relationship of the parties. This type of narrow choice-of-law clause calls for the application of the selected law to determine only the scope and effect of the release. . . . Thus, the Delaware Supreme Court applied Delaware law only in determining the effect of the release, and held that the release did not bar Plaintiffs' fraudulent inducement claims.

Pet. App. 11-12. Thus, the question was not one of "enforce[ment]" of the choice-of-law clause (Pet. 7), but rather ***interpretation*** under state law of the scope of a valid choice-of-law clause.

b. Petitioners again mischaracterize the Court of Appeals' decision when they state that it "utterly ignored the Florida Supreme Court's earlier articulation of the relevant conflicts of law standards in cases such as these." Pet. 9. To the contrary, the Eleventh Circuit specifically considered and correctly rejected the very argument Petitioners press in this Court:

> Plaintiffs argue that *Mazzoni Farms* had already established that Delaware law governs the substantive elements of their claims. In *Mazzoni Farms*, this court certified to the Florida Supreme Court the question of whether the choice-of-law

> provision controls the release provisions of the settlement agreement. The court answered that the choice-of-law provision does control the release provisions of the settlement agreement and that Delaware law should be applied to determine whether the release barred Plaintiffs' fraudulent inducement claim. The Supreme Court of Delaware, in turn, held that the release in question does not bar fraudulent inducement claims.
>
> Neither *Mazzoni Farms* nor *Florida Evergreen Foliage*, however, dealt with the question of what state's substantive law should be applied to the Plaintiffs' tort claims. The Florida Supreme Court in *Mazzoni Farms* did not address what state's laws would govern the elements of any tort claims not barred by the release, and the Delaware Supreme Court in *Florida Evergreen Foliage* did not address the scope of the choice-of-law clause, the law applicable to the fraudulent inducement claims not barred by the release, or any other conflicts issues. Rather, *Mazzoni Farms* and *Florida Evergreen* Foliage dealt with whether the tort claims were still viable in light of the release. Therefore, neither *Mazzoni Farms* or *Florida Evergreen Foliage* determined that Delaware law governs the substantive elements of Plaintiffs' claims, as they contend.

Pet. App. 12-13. Thus, both of the courts below carefully considered and rejected Petitioners' arguments that the prior state Supreme Court rulings controlled the conflicts issue here.

4. Finally, Petitioners fail to describe adequately the RICO rulings of the courts below and then use their inadequate descriptions as the groundwork for their alleged "circuit splits."

Both the District Court and the Court of Appeals divided the Petitioners' RICO claims into two types of predicate acts: (1) obstruction of justice and witness tampering; and (2) mail and wire fraud. The courts below held (and Petitioners raise no issue in this Court) that the federal obstruction of justice and witness tampering predicates are limited to prior federal proceedings. The only federal proceeding alleged by Petitioners is the federal case styled *Bush Ranch v. DuPont* (a case to which Petitioners were not parties). The "indirect injury" rulings of the District Court and the Court of Appeals were limited to Petitioners' claimed injury from DuPont's alleged obstruction of justice and witness tampering in *Bush Ranch.*

Petitioners' assertions of mail and wire fraud, in contrast, rested on allegations of fraudulent litigation statements in their own underlying cases and in other cases their attorneys allegedly were monitoring (including *Bush Ranch*). Petitioners (or their agents) claimed to have heard and relied on the alleged misrepresentations. They did not claim injury based on misrepresentations to third parties which Petitioners did not hear or rely upon (but which nevertheless caused them injury).

These claims were rejected by both the District Court and the Court of Appeals on the ground Petitioners could not establish reasonable reliance. The pleadings established that, before and when the parties settled, Petitioners had accused and were accusing Respondent of making fraudulent litigation statements. Petitioners' current claims similarly allege that Respondent had made false litigation statements. This undisputed distrust of Respondent made Petitioners' alleged reliance unreasonable as a matter of law. These rulings thus

involved no claim that Petitioners had been injured without hearing and relying on the alleged misrepresentations, the critical fact in several of the cases addressed in the Petition.[1]

## REASONS FOR DENYING THE PETITION

As shown above, Petitioners predicate their conflicts of law argument on misstatements regarding the prior proceedings in these and related cases. The record shows that the Court of Appeals applied and followed, rather than ignored, governing Florida state law on the conflicts issues and on the substantive legal issues supporting dismissal of Petitioners' state law claims.

Petitioners' elaborate efforts to manufacture circuit splits on the RICO issues similarly rest on out-of-context quotations and a misapprehension of the holdings of the cases. Ultimately, Petitioners fail to cite a single decision authorizing the RICO claims they sought to press here. Accordingly, the Petition for Certiorari should be denied.

---

1. The District Court also held that Petitioners' RICO claims were barred by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), a ruling not addressed by the Court of Appeals. Pet. App. 104-10. The trial court's ruling on this issue has been followed by several subsequent decisions. Accordingly, even if this Court reversed the RICO rulings, Petitioners' RICO claims would still fail.

## I. THE COURT OF APPEALS FOLLOWED, RATHER THAN IGNORED, GOVERNING FLORIDA STATE LAW ON THE CONFLICT OF LAWS AND COMMON LAW TORT ISSUES

### A. Contrary to Petitioners' Misstatements, the Court of Appeals Properly Analyzed and Applied the Governing Florida Conflicts of Laws Principles

As explained above, the Florida Supreme Court addressed the enforceability of the Delaware choice-of-law clause in the parties' prior settlement and its application to the construction and effect of the settlement, but did not address whether the clause called for the use of Florida law to supply the elements of Petitioners' separate tort claims. Consistent with the ruling that Delaware law applied to contractual interpretation and enforcement issues, the Delaware Supreme Court ruled that the release in the settlements did not bar fraud claims, but did not speak to any conflicts issues for determining the substantive law to govern those claims (nor could it, given that the conflicts issue is controlled by Florida and not Delaware law).

Both of the courts below expressly acknowledged and examined the prior certification rulings, but properly recognized the relationship between those rulings and the present case. Neither of those previous decisions purported to dictate the substantive law applicable to tort claims. The narrow choice-of-law clause did not itself, as a matter of state law, extend to Petitioners' tort claims against Respondent, and therefore those claims were subject to the usual state law choice-of-law and substantive tort principles. The conflicts of law rulings made by the courts below involved nothing more than a construction of the choice-of-law clause in the parties' settlement agreement.

Both the District Court and the Eleventh Circuit honored their *Erie* duty to follow the Florida Supreme Court's prior ruling that the choice-of-law clause was enforceable and supplied the law for contractual interpretation and enforcement issues. That is an entirely different question, however, from the issue decided by the courts below: whether the choice-of-law clause in the agreement was broad enough to apply to the substantive elements of Petitioners' tort claims.

The choice-of-law clause here provides only that "[t]his Release shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of law provisions thereof." Pet. App. 223. As found by the courts below, this required the application of Delaware law to the issue of whether the release clause barred Petitioners' fraud claims, but did not contain the broader language necessary to require application of Delaware law to tort claims.

> The clause does not refer to related tort claims or to any and all claims or disputes arising out of settlement or arising out of the relationship of the parties. This type of narrow choice-of-law clause calls for the application of the selected law to determine only the scope and effect of the release

Pet. App. 11; *see also* Pet. App. 42-43 (choice of law clause "is not broad enough to encompass tort claims. . . . The choice of law provision does not state that any and all claims arising out of the relationship of the parties shall be governed by Delaware law, or anything to that effect").

This Court need not review the ruling construing the choice-of-law clause to be inapplicable to the fraud and tort claims,

which in any event was correctly decided by the courts below. Contrary to Petitioners' assertions, this ruling simply determined what claims were embraced by their choice-of-law agreement. And there is absolutely no indication that the courts below did not "lik[e]" the earlier conflicts ruling of the Florida Supreme Court. Pet. 10. To the contrary, both courts followed the ruling without question and addressed its application here.

### B. The Court of Appeals' Decision in No Way Shows "Confusion" as to the Proper Application of *Klaxon*

Having determined that the choice-of-law clause governing interpretation of the settlement agreement did not purport to select the law governing the substantive elements of Petitioners' claims under state tort law, the courts below proceeded to another unremarkable issue: application of Florida's general conflicts rule for tort claims. Given that Florida was Petitioners' state of residence and the place where the events giving rise to the dispute occurred, Florida law applied to Petitioners' common law tort claims. Pet. App. 13-14; 42-43. Indeed, Petitioners expressly stated that they were bringing their tort claims under Florida law. Pet. App. 128.

This decision in no way represented the rejection of a "specific conflicts rule tailored to the particular situation at hand" (Pet. 10), because that "specific" conflicts rule announced by the Florida Supreme Court did not address this issue at all. The Court of Appeals was not presented with any choice "between two equally valid choice of law rules" (Pet. 11), because the rules addressed two different conflicts issues: the enforceability of the choice-of-law clause, on the one hand, and the conflicts rule applicable to tort claims not within the choice-of-law clause, on the other.

Nor did the Eleventh Circuit refuse to "enforce[] a forum's specific invocation of *Restatement* section 201." Pet. 11. In the first place, as noted above, the Florida Supreme Court specifically declined to address § 201 (whether a choice-of-law clause governs a claim to rescind an agreement) because it found that the plaintiffs there, like Petitioners here, had retained the settlement proceeds and thereby "affirmed" the settlements. Under these facts, the Florida Supreme Court in *Mazzoni Farms* held that the choice-of-law clause was enforceable as written.

In the second place, the § 201 issue has nothing to do with the issue addressed by the Court of Appeals: whether the choice of law encompassed the substantive law for tort claims. Merely holding that the choice-of-law clause was ***valid*** did not purport to resolve the entirely separate issue of the clause's ***scope***. On this issue, the authorities agree that a clause such as that in Petitioners' settlement does not encompass separate tort claims. Pet. App. 11-12, 42-43. Petitioners do not identify conflicting authorities, much less show a ground for certiorari on this state law issue.

Finally, Petitioners do not explain how the Eleventh Circuit "obliquely questioned the continued wisdom and vitality of *Klaxon*, and openly considered whether they should create an independent general law of conflicts of laws." Pet. 13. To the contrary, the Court of Appeals favorably cited *Klaxon* and faithfully followed its dictates. Pet. App. 13.

### C. Petitioners' Certification Argument is Spurious

Although Petitioners claim that the Eleventh Circuit should have certified the state law issues to the Florida Supreme Court (Pet. 14-17), they concede that the issue ultimately falls within

the Court of Appeals' "sound discretion." *Id.* 15. Petitioners fall far short of even a colorable showing that the Court of Appeals abused its discretion.

As shown above, Petitioners rely on misstatements as to the conflicts issue resolved in *Mazzoni Farms* and the interlocutory certification ruling of the District Court. In fact, the Florida state law rules at issue are well-settled and inappropriate for certification, and Petitioners make no showing to the contrary.

The litigation privilege ruling, for example, was based on a Florida Supreme Court decision issued in response to a certified question from the Eleventh Circuit just ten years ago. *See* Pet. App. 14-18 (following *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994)). Certification procedures were not intended to allow a federal Court of Appeals to ask a state Supreme Court if it meant what it said when it answered a certified question ten years earlier.

The reasonable reliance rule applied by the Court of Appeals is similarly well-settled. *See* Pet. App. 19-22 (following *Mergens v. Dreyfoos*, 166 F.3d 1114, 1118 (11th Cir. 1999) (following *Pettinelli v. Danzig*, 722 F.2d 706, 710 (11th Cir. 1984))); *see also* Pet. App. 70-72, 78-80 (collecting additional Florida law decisions applying the reasonable reliance rule, including the landmark Florida Supreme Court decision in *Columbus Hotel Corp. v. Hotel Mgmt. Co.*, 116 Fla. 464, 156 So. 893 (1934)). Certification is not appropriate for a state law rule applied without reservation by state and federal courts for seventy years.

Petitioners also rely on the District Court's decision to certify its first decision for immediate appeal to the Eleventh

Circuit pursuant to 28 U.S.C. § 1292(b). In entering that certification, it stated that "[r]easonable jurists could disagree with this Court's interpretation of the Florida and Eleventh Circuit precedent regarding litigation conduct and reasonable reliance." Pet. App. 83-84. Since that ruling, the Court of Appeals unanimously has agreed with this interpretation. It is not and cannot be the rule that the mere fact a District Court certifies state law issues under Section 1292(b) mandates that the Court of Appeals in turn certify the issues to the pertinent state Supreme Court. Accordingly, certification was unwarranted.

## II. PETITIONERS' RICO ARGUMENTS DO NOT DEMONSTRATE A CONFLICT AND PROVIDE NO BASIS FOR CERTIORARI

The RICO statute requires that the plaintiff show injury to its business or property "by reason of" the defendant's racketeering activity. 18 U.S.C. § 1964(c). In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court interpreted Section 1964(c) to incorporate common law proximate cause concepts into RICO.

Petitioners assert circuit splits on two specific applications of the requirement that a civil RICO plaintiff demonstrate injury "by reason of" racketeering activity (18 U.S.C. § 1964(c)). They are wrong on both the existence of the conflicts and on the merits of their argument. Indeed, Petitioners essentially repeat the same arguments urged in several recent unsuccessful petitions for certiorari.[2] Nothing has changed since this Court declined to review these issues, and there is no reason for a

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2. *See Lerner v. Fleet Bank, N.A.*, 124 S. Ct. 532 (2003) (denying certiorari); *Sandwich Chef of Texas, Inc. v. Reliance National Indem. Ins. Co.*, 124 S. Ct. 101 (2003) (same); *Summit Properties, Inc. v. Hoechst-Celanese Corp.*, 531 U.S. 1132 (2001) (same).

different disposition here. In the end, Petitioners' arguments reflect a misapprehension of the cited cases and a misunderstanding of this Court's clear ruling on the proximate cause concepts embodied in § 1964(c).

### A. Petitioners' "Indirect Injury" Argument Does Not Involve a Conflict and Fails to Show That This Case is Appropriate for Further Review

In this case, the Eleventh Circuit held – and Petitioners do not challenge here – that the federal obstruction of justice and witness tampering predicates are limited to federal proceedings and that the "only federal case in which [Petitioners] allege any of the predicate acts took place is the *Bush Ranch* case." Pet. App. 25-26. Petitioners were not parties to *Bush Ranch*, and the *Bush Ranch* court and *Bush Ranch* plaintiffs obviously were the most direct victims of any alleged misconduct there.

The Court of Appeals quoted *Holmes* for the proposition that parties (such as Petitioners) complaining of harm "'flowing merely from the misfortunes visited upon a third person by defendant's acts [are] generally said to stand at too remote a distance to recover.'" *Id.* at 26 (quoting *Holmes*, 503 U.S. at 268-69). Petitioners' harm here flows from DuPont's alleged misconduct towards the *Bush Ranch* plaintiffs and court.

With respect to Petitioners' claim that DuPont specifically intended to deceive all of the parties who allegedly were "monitoring" the *Bush Ranch* case (including Petitioners), the Eleventh Circuit explained that "the directness inquiry is not a question of specific intent." *Id.* at 27 (citing *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)). As explained in *Holmes*, the proximate cause question turns on considerations wholly

unrelated to intent, such as "ideas of what justice demands, or of what is administratively possible and convenient." 503 U.S. at 268 (internal quotation marks and citation omitted). Even where an act is alleged to injure both an immediate victim and a more remote victim, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Id.* at 271 (internal quotation marks and citations omitted).

Here, there is no dispute that Petitioners were not the most immediate victims of DuPont's alleged litigation misconduct in *Bush Ranch*. Accordingly, the Court of Appeals concluded that Petitioners had not shown injury "by reason of" DuPont's alleged obstruction of justice and witness tampering in that case. Pet. App. 27-28.

### 1. Petitioners' Claims Do Not Implicate their Alleged "Convergence" Issue

Petitioners argue that the Eleventh Circuit's ruling here represents the view of a minority of circuits requiring "convergence." By this term, Petitioners refer to an asserted rule of law that "only those plaintiffs who were the immediate recipients of the defendant's ***misrepresentations*** may recover from the defendant under RICO." Pet. 20 (emphasis added).

Neither of the courts below, however, applied the indirect injury rule to the alleged misrepresentations and thus did not bar the claims of mail and wire fraud on that ground. Instead, both courts applied the indirect injury rule to a very narrow and specific set of allegations: alleged acts of obstruction of justice and witness tampering in *Bush Ranch*.[3]

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3. In addition, the extremely limited time period in which these acts allegedly occurred – two months at the most – is too short to satisfy the RICO requirement of "a series of related predicates extending over

(Cont'd)

In this Court, Petitioners do not raise – indeed, they do not mention – the obstruction and tampering predicate acts for their RICO claims. They address their "convergence" argument solely to the predicate acts of mail fraud and wire fraud. With respect to the latter acts, however, the Court of Appeals did not rely on any "convergence" theory in rejecting Petitioners' argument. The dismissal of these claims was affirmed by the Eleventh Circuit on the ground that Petitioners could not establish reasonable reliance on Respondent's alleged misrepresentations.

Accordingly, by challenging the judgment below on a ground that was not the basis for the Court of Appeals' ruling, Petitioners ask this Court to decide a "strawman" issue that would not result in a reversal even if decided in Petitioners' favor.

### 2. There is No Circuit Split as to the Non-Controlling "Convergence" Rule

In any event, the cases cited by Petitioners do not demonstrate a circuit conflict as to whether a RICO plaintiff must be the "immediate recipient" of a misrepresentation to recover.

a. Four of the cases identified by Petitioners as rejecting "convergence" have absolute nothing to do with the interpretation of *Holmes'* direct injury requirement. Two cases are criminal cases, which necessarily involve no decision as to whether the "by reason of" civil RICO requirement has been

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(Cont'd)

a substantial period of time." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989) ("continuity" requirement not satisfied by alleged predicate acts "extending over a few weeks or months and threatening no future criminal conduct").

met. *See United States v. Christopher*, 142 F.3d 46 (1st Cir. 1998) (affirming convictions for, *inter alia*, wire fraud); *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997) (affirming convictions for, *inter alia*, mail and wire fraud). Two of the cases pre-date *Holmes*, and thus cannot be characterized as having "interpreted" it. *See Environmental Tectonics v. W.S. Kilpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983).

b. Another case cited by Petitioners neither approves nor rejects a rule limiting RICO claims to the "immediate recipient" of a misrepresentation. In *Mylan Laboratories, Inc. v. Matikari*, 7 F.3d 1130, 1136 (4th Cir. 1993), the RICO plaintiff was allowed to base a RICO claim on alleged misconduct in the defendants' dealings with a third party (the FDA). In the portion of the case cited by Petitioners, the only reference to a limitation of civil RICO claims to the "immediate recipient" of a misrepresentation occurs in the discussion of the trial court's alternative grounds for dismissing the RICO claims. *Id.* at 1137. The Fourth Circuit did not analyze the correctness of this holding, however, because the plaintiff sought an opportunity to amend the RICO claims. *Id.*

c. Three of the cases identified by Petitioners as adopting "convergence" (and thereby imposing a categorical limitation of RICO claims to "immediate recipients of the defendant's misrepresentations") represent a straightforward application of the indirect injury rule announced in *Holmes*. These cases turn on the question whether – as an objective matter and apart from the defendant's specific intent – the racketeering activity was directed primarily to the plaintiff or instead to a different person or entity. Under that approach, the court in each case carefully measured the particular plaintiff's theory of RICO injury against

*Holmes* and rejected the claims because the allegedly injurious conduct was directed primarily at third parties. *See Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir.) (recovery disallowed when racketeering activities directed primarily at third parties), *cert. denied*, 124 S. Ct. 532 (2003); *Israel Travel Advisory Service v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) (recovery disallowed when plaintiff competitor's harm was merely derivative of direct harm suffered by consumers); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924 (9th Cir. 1994) (recovery disallowed when plaintiff's harm was derivative of direct injury). The ultimate rule of law announced in these cases is that, when the alleged racketeering acts are directly primarily at a party other than the plaintiff, as confirmed by an analysis of *Holmes*, then the plaintiff cannot recover for its indirect injury.

These decisions support the Court of Appeals' ruling in this case. Here, the acts that allegedly injured Petitioners were directed primarily at third parties (the *Bush Ranch* plaintiffs and court). Accordingly, the decision below does not conflict with the cited cases.

d. A decision Petitioners cite as rejecting the "convergence" rule undertakes the same examination of *Holmes* as the above-cited cases. That decision, however, allowed the RICO claim to proceed, because the plaintiff's particular theory of RICO injury did *not* depend on indirect injury from conduct directed primarily at third parties. *See Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993) (recovery allowed when plaintiff's harm flowed directly from bribery of public officials). Again, however, there is no analysis of the acceptance or rejection of any "convergence" requirement. To the contrary, the reasoning employed in this case – an analysis of whether there is a more directly injured party and a weighing of the *Holmes* policies –

fully accords with the reasoning employed by the Court of Appeals in this case and with the other decisions cited above.

e. Finally, the Fifth Circuit's decision in *Procter & Gamble v. Amway*, 242 F.3d 539 (5th Cir. 2001), presents an atypical indirect injury issue that is different from, but in no way in conflict with, the present case. Petitioners' claim entails none of the circumstances involved there.

In *Procter & Gamble*, the RICO plaintiff (P&G) sought to recover from a defendant (Amway) whose representatives had spread false rumors that P&G was affiliated with Satanism. As a result, some customers who heard these misrepresentations boycotted P&G and gave business to Amway.

The Fifth Circuit expressly acknowledged that RICO claims predicated on fraud typically require proof of direct reliance by the immediate victim of the fraud. *Id.* at 564. Indeed, the court cited controlling law in the circuit for that principle. *Id.* (citing *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001)). By its terms, however, this rule does not apply in the unusual circumstance where racketeering conduct *directed at* and *injurious to* the victim and not to a third party is accomplished through misrepresentations made solely to that third party and not to the victim. *Id.* at 564-65.

Allowing recovery by a party who did not even hear (and thus did not "rely") on the misrepresentation in the unusual circumstances of *Procter & Gamble* accords with the indirect injury rule in *Holmes*. In that situation, the fraud is directed to the victim and not to the third parties to whom the misrepresentations are made (and who are thus mere "instrumentalities" of the fraud rather than the direct victims).

The victim's injury is solely attributable to the RICO harm; recovery need not be apportioned among multiple injured parties; and the directly injured party is seeking recovery.

In this case, in contrast, the plaintiffs and the court in *Bush Ranch*, not Petitioners, were the direct victims of Respondent's alleged litigation misconduct. Under Petitioners' own allegation, Respondent's misconduct was directed at these victims; Petitioners do not claim and have never alleged that the *Bush Ranch* parties and court were uninjured "instrumentalities" of racketeering activities directed towards Petitioners. Thus, Petitioners' RICO claims cannot stand under the indirect injury rule of *Holmes*, and there is no conflict with respect to that issue.

### B. The Circuits Are Not Divided on Whether a Civil RICO Plaintiff Who Claims to Have Been the Recipient of a Misrepresentation Must Show That Reliance on the Misrepresentation Was Reasonable

#### 1. The Lower Courts' Mail and Wire Fraud Rulings

Petitioners' RICO claims predominantly were based on mail and wire fraud. According to Petitioners, they (or their attorney) heard or received allegedly false litigation statements (such as allegedly incomplete discovery responses) by DuPont in their underlying cases and in other underlying Benlate®-related cases, and decided to settle based on the tainted "evidentiary record" created by those misrepresentations.

The courts below rejected these claims on the ground that Petitioners could not show that their alleged reliance on the purported litigation statements was reasonable, given that Petitioners and others repeatedly had accused DuPont of making

false litigation statements at the time of settlement. Petitioners' claims therefore squarely implicated a "reasonable reliance" rule developed in the "settlement fraud" context: "When negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties." Pet. App. 19 (internal quotation marks and citation omitted); *see also id.* at 25.

### 2. Petitioners Fail to Demonstrate a Circuit Conflict on Whether a RICO Plaintiff's Reliance Must Be Reasonable

The legal issue resolved in the decisions below was whether a RICO plaintiff who claims injury by reason of direct reliance on an alleged misrepresentation is required to establish that its reliance was reasonable. In deciding that issue, there was no factual question whether Petitioners (and their attorney) actually heard or received the misrepresentations, and thus no question was presented as to whether a RICO plaintiff can satisfy proximate cause when it did not receive the misrepresentation. Indeed, the very crux of Petitioners' theory was that there had been reliance. The courts below rejected Petitioners' claims on the ground that such actual reliance was legally unreasonable. This issue was properly decided by both courts and presents no conflict in the circuits.

In the typical case, a party alleging RICO fraud (like any other type of fraud) claims to have heard a misrepresentation and acted in reliance thereon. Requiring the plaintiff to have acted in reasonable reliance on the misrepresentation ensures that its injury occurs "by reason of" the racketeering activity. *See, e.g.*, *Pelletier v. Zweifel*, 921 F.2d 1465, 1508 (11th Cir. 1991) ("[u]nless an untrue statement is believed and acted upon, it can occasion no legal injury") (internal quotation marks

omitted). The courts of appeals uniformly hold that, in such a situation, a RICO plaintiff must establish that it actually relied on the misrepresentation and that such reliance was reasonable. *See, e.g., id.; Bank of China v. NBM LLC*, 359 F.3d 171, 176 (2d Cir. 2004); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994).

The decision below accords with this unbroken line of cases. Here, Petitioners claim to have received and relied on DuPont's alleged misrepresentations. Accordingly, they must show that their reliance on the misrepresentations was reasonable. This they failed to do in light of their belief and allegation at the time that Respondent was engaged in a fraudulent scheme to deceive them. The Court of Appeals' fact-specific ruling in this regard was correct and raises no conflict or other ground warranting this Court's review.

In contrast to the typical RICO fraud case – including the present one – some RICO cases involve plaintiffs who seek to recover despite not having heard and acted upon the alleged misrepresentation. The *Procter & Gamble* case discussed above is an example. There, the RICO plaintiff did not hear, and therefore did not rely upon, the misrepresentations that were made to third parties. Nevertheless, the court allowed a RICO claim because the plaintiff was the party directly injured by the misrepresentations to the third parties. The third parties themselves suffered no direct harm, but instead were instrumentalities for the injury to the RICO plaintiff.

When a scheme to defraud a victim is effectuated through an alleged misrepresentation to a third party, proximate cause in *Holmes* still requires reliance, but it is sufficient that the third party recipient of the misrepresentation reasonably relied.

*See, e.g.*, *Procter & Gamble*, 242 F.3d at 565 (when victim is injured by means of misrepresentations to third parties, the third party recipients' "reliance suffices to show proximate causation"); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990) (scheme to defraud accomplished through misrepresentations to Public Service Commission requires proof that "misrepresentations to the PSC were relied upon by the PSC").

The decisions cited by Petitioners for the alleged "conflict" fall into this category. Those cases, however, do not establish a conflict but rather only the existence of two different rules of decision for two different and distinguishable types of cases. For example, in *Systems Mgmt, Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002), the alleged misrepresentations were made entirely to a third party and not to the plaintiff-victim that was injured by them. *See id.* at 104 (fraudulent scheme to defraud plaintiff-victim was effectuated "by deceiving" the third party, who relied on misrepresentations in causing RICO injury to direct target of fraudulent scheme) Indeed, in that case the defendant did not contest causation (or proximate cause) at all.

The absence of a conflict is made plain by the co-existence in individual circuits of these two rules of decision that Petitioners contend are irreconcilable. Indeed, although Petitioners do not acknowledge it, their own Petition establishes this reality. Petitioners assert (Pet. 23 & n.5) that the Fifth Circuit has "waffled" on which of the two rules is correct. In fact, however, the cited decisions clearly establish that the court of appeals has applied one or the other of these rules depending upon which of the above two fact patterns is presented. The same is true in other circuits. *Compare, e.g.*, *Bank of China*, 359 F.3d at 176 (where the Second Circuit noted that "it is well established in this Circuit that, where mail fraud is the predicate

act for a civil RICO action, the proximate cause element articulated in *Holmes* requires the plaintiff to show 'reasonable reliance'"), *with Long Island Lighting*, *supra*, (cited at Pet. 22 as a decision of the Second Circuit allegedly in conflict with the reasonable reliance principle recently affirmed in *Bank of China*). This settled law in the circuits refutes rather than establishes a conflict and reflects nothing more than the courts of appeals' consistent recognition and application of different rules of proximate cause under *Holmes* in two different and distinguishable factual contexts that tend to recur in civil RICO fraud cases.

The instant litigation presents the typical RICO case rather than the unusual situation involved in *Proctor & Gamble* and *Systems Management*. Here, Petitioners alleged – indeed, their RICO claims hinge on – their reliance in fact on the misrepresentations that they actually heard or saw. In those other cases, by contrast, a non-injured third party was used as the instrumentality for causing injury to a direct victim that did not itself receive the misrepresentation. In these circumstances, Petitioners can advance no conflict or other reason for intervention by this Court.[4]

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4. Indeed, the court of appeals held that Petitioners' reliance was legally unreasonable. It is hard to conceive of *any* rule of proximate cause under *Holmes* that would allow a RICO plaintiff to proceed in the face of the conclusion that its conduct was legally unreasonable.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In The
# Supreme Court of the United States

GREEN LEAF NURSERY, INC. and GEORGE A. PENA,

*Petitioners,*

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioners, Green Leaf Nursery, Inc. and George A. Pena, respectfully submit this Reply to Respondent's Brief in Opposition ["Op. Cert."].

## ARGUMENT

1. In regard to Petitioners' state common law tort claims, Respondent naturally seeks to characterize the court of appeals' ruling as being consistent with Florida's choice of law principles and this Court's command in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), that federal courts defer to the conflicts rules of the forum. Regrettably, the decision below is not consonant with these directives.

As already discussed in the Petition, see Pet. 7-14, the court of appeals was faced with the choice of applying Florida's generic interest balancing test with a more specific rule, derived from the RESTATEMENT (SECOND) OF CONFLICTS (1971), that "the effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law" "chosen by the parties to govern their contractual rights and duties." Id. §§ 187(1) & 201. Despite Respondent's assertions, this provision has been found by Florida courts to apply not only to contractual remedies of rescission, but also any corollary tort remedies arising from a misrepresentation in the formation of a contract, including fraud in the inducement. See *Mazzoni Farms, Inc. v. E.I. du Pont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000); see also Fla. Stat. § 671.105(1) (1999) ("[W]hen a transaction bears a reasonable relation to this

state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.").

To the extent that this issue remains open in Florida law (which Respondent appears to concede, see Op. Cert. 4-5, 14, as did the district court below, see Pet. App. 83a-84a), the proper course for the court of appeals was to again certify the issue to the Florida Supreme Court, and not to willy-nilly prescribe its own choice of law *diktat*. Respondent's repeated justification for the court of appeals' holding – that there is some ostensible distinction between rulings that go to a choice-of-law clause's validity, as distinct from its scope – cannot withstand serious scrutiny. The issue here is whether Delaware law, not Florida law, prescribed the underlying elements for the plaintiffs' common law tort actions. The CONFLICTS RESTATEMENT and Florida's own statutory choice-of-law direction confirm such a result. When plaintiffs selected Florida law as the basis of their state common law claims, that included Florida's conflicts principles, which, in this instance would refer-back (*renvoi*) to the law selected by the parties.

The fundamental failing of the decision below is the lack of solicitude it shows to Florida's own statutory and judge-made conflicts rules that would extend greater deference to the parties' choices and to the application of another jurisdiction's substantive tort law to an action pending in the forum. *Klaxon*'s crucial insight – so often ignored – is that states should make their own conflicts rules, in preference to the tendency of federal courts to fashion a homogenous rule of interest balancing in which the forum's law always prevails.

2. Appearing to recognize that Petitioners have raised significant issues as to the proper construction of the "by reason of" language of the civil RICO statute, 18 U.S.C. § 1964(c), and the application of this Court's proximate cause analysis in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), Respondent is reduced to disclaiming the severity of the conflict in the circuits and to make a half-hearted attempt to harmonize these discordant authorities in a way that purports to justify the decision below.

a. The court of appeals rejected plaintiffs' obstruction of justice and witness tampering claims, holding that they failed to satisfy a direct injury based on Respondent's conduct, within the ambit of the Court's decision in *Holmes*, see Pet. App. 25a-28a; plaintiffs' mail and wire fraud claims were denied based on a lack of reasonable reliance on du Pont's representations, thus falling outside the causation requirement of section 1964(c); see Pet. App. 24a-25a. Both these rulings implicate key aspects of litigating civil RICO claims. Both are the subject of substantially different treatment and approaches among the circuits. In both instances, the stringent standard of causation selected by the court below effectively scuttled the claims; Petitioners' case could have proceeded had the court used a more gracious standard of causation. For these reasons, this Petition presents an ideal vehicle for resolving these issues, superior to those cases which this Court has recently considered and rejected.

b. Respondent's glib assertion that there is no real circuit split on what has come to be called the "convergence" rule for *Holmes*'s direct injury inquiry – a requirement that between the party to whom a misrepresentation is made and the victim from whom property is

obtained, there be a direct link – is belied by the courts of appeals' own rulings. Compare *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993), cert. denied sub nom. *American Home Products Corp. v. Mylan Laboratories, Inc.*, 510 U.S. 1197 (1994); *Johnson Enterprises of Jacksonville, Ind. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (requiring convergence in civil RICO cases); with *Monterey Plaza Hotel Ltd. Partnership v. Local 483, Hotel and Restaurant Employees Union*, 215 F.3d 923, 926 (9th Cir. 2002); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 n.4 (8th Cir.), cert. denied, 510 U.S. 823 (1993) (rejecting convergence).[1]

No matter how Respondent chooses to characterize it, the convergence rule – whatever form it is articulated in or how it is applied – is effectively a bar on civil RICO reaching third-party frauds and misrepresentations. Although the convergence rule is analytically distinct from the requirement of reasonable reliance (more on which presently), it operates to vastly constrict the scope of civil

[1] See also *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3d Cir. 1998); *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995); *BCCI Holdings (Luxemburg), S.A. v. Khalil*, 214 F.3d 168, 173-74 (D.C. Cir. 2000) (all rejecting convergence). Even two of the circuits that require reasonable reliance on a misrepresentation, the Second and the Fourth Circuits, permit a civil RICO fraud case where a third party, rather than the injured victim, relied on the defendants' fraud. See, e.g., *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 384 (2d Cir. 2001) ("a plaintiff has standing where the plaintiff is the direct target of the RICO violation."); *Mid Atlantic Telecom., Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (defendant's fraud to customers may have proximately injured plaintiff-competitor).

RICO proceedings in a way not intended by Congress, nor by this Court insofar as *Holmes*'s proximate causation is concerned. Even under Respondent's crabbed reading of the cases, two circuits require convergence in civil RICO cases, while six reject it.

c. If anything, the split in the circuits is even more notorious as to whether there should be a requirement of reasonable reliance on misrepresentations, in order to fall within the causation language of section 1964(c). Despite du Pont's protestations, this split is hardly of Petitioners' imagination; it has been acknowledged in courts of appeals opinions. See *Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 103-04 & n.3 (1st Cir. 2002) ("It is true that at common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. But RICO bases its own brand of civil liability simply on the commission of specified criminal acts – here, criminal fraud – so long as they comprise a 'pattern of racketeering activity' and criminal fraud under the federal statute does not require 'reliance' by anyone: it is enough that the defendant sought to deceive, whether or not he succeeded.") (collecting cases documenting circuit split). At last count, four circuits (the Second, Fourth, Sixth, and Eleventh) require reasonable reliance, and five (the First, Third, Fifth, Eight and Ninth) do not.[2] Indeed, the split may be broader and deeper than

[2] Petitioner earlier documented the rejection of reasonable reliance by the First, Third and Fifth Circuits. Pet. 22-23. The Eighth and Ninth Circuits are also on record in opposition. See *United Healthcare Corp. v.*

(Continued on following page)

first supposed, when one takes into account those cases that tend to merge reasonable reliance and convergence idioms. See, e.g., *Cement Contractors Workers District Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998); *Mid Atlantic Telecom., Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994).

Respondent attempts to harmonize this divergent authority – to knit a whole cloth of fabric from these colored skeins of case law – by suggesting, Op. Cert. 27-28, that they are just different points along a continuum of proximate cause. Even with such skillful weaving, alas, the result is more a crazy quilt than an argyle sweater. Respondent argues that two rules are subliminally at work in these cases: one for instances where the misrepresentation was made to the victim-party, and where they are made to a third-party. Regrettably, the cases relied upon by Respondent do not support this factual nuance. Courts of appeals embracing the reasonable reliance rule have applied it indiscriminately to both factual situations.

Respondent's creative harmonization of civil RICO causation doctrine also points to a distinctive feature of this case, and grounds that should counsel the Court to grant review here. It is precisely the combination of the convergence and reasonable reliance theories which acts to

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*Am. Trade Ins. Co.*, 88 F.3d 563, 571 n.5 (8th Cir. 1996) ("[I]t is well settled that such a showing [of detrimental reliance] is not required to prove mail or wire fraud."); *Wilcox v. First Interstate Bank of Or.*, 815 F.2d 522, 531 n.7 (9th Cir. 1987) ("the elements necessary to support damages under civil RICO are different from . . . common law fraud. The difference is that 'justifiable reliance is not an element that need be proven to establish a mail fraud violation'.") (quoting *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986)).

bar a wide class of cases that neither Congress (in legislating the "by reason of" language of section 1964(c)) nor this Court (in *Holmes*) intended to categorically prohibit. Taken individually, neither theory works to exclude a large group of third-party frauds and misrepresentations from the ambit of civil RICO. But when used together, the result is awesomely broad. To suggest, as Respondent appears to, that the reasonable reliance requirement is somehow softened by normal proximate cause considerations, ignores the court of appeals' use of convergence as a ground to bar third-party claims altogether. Both issues are perfectly framed in this case. The split in the circuits on this complex of causation issues in civil RICO is growing, and not diminishing. Any hopes that this division would fade as courts proceeded to elaborate causation standards have proven illusory. It requires this Court's intervention to elucidate the *Holmes*' proximate causation analysis in regard to the convergence and reasonable reliance bars on civil RICO actions raising fraud and misrepresentation claims.

## CONCLUSION

For the foregoing reasons, along with those earlier presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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